

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,366

JOSEPH A. WAGSTAFF, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

**Appeal from the United States District Court
for the District of Columbia**

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JUN 19 1952

Joseph W. Stewart

CLERK

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JOINT APPENDIX

I.

**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS**

158 Filed in Open Court Oct 17 1951

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

(Grand Jury Impanelled Sept. 4, 1951 and
Sworn in Sept. 5, 1951)

THE UNITED STATES OF AMERICA

v.

JOSEPH A. WAGSTAFF
RICHARD H. OSBORNE

Criminal No. 1449-'51

Grand Jury No. 1479-51

Robbery (22-D.C.C. 2901)

Vio. 22 D.C.C. 3202

Vio. 22 D.C.C. 3204

Indictment

The Grand Jury charges:

On or about September 25, 1951, within the District of Columbia, Joseph A. Wagstaff and Richard H. Osborne, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of George R. Murray, property of George R. Murray, of the value of about \$10.60, consisting of the following: ten dollars and sixty cents in money; they the said Joseph A. Wagstaff and Richard H. Osborne being then and there armed with a pistol.

SECOND COUNT:

On or about September 25, 1951, within the District of Columbia, Joseph A. Wagstaff and Richard H. Osborne carried a pistol on or about their person, without a license having been issued as provided by law.

GEORGE MORRIS FAY
*Attorney of the United States in
and for the District of Columbia*

A True Bill:

GEORGE M. THOMPSON
Foreman.

163

Filed Nov 29 1951

Plea of Defendant

On this 29th day of November, 1951, the defendant Joseph A. Wagstaff, appearing in proper person and by his attorney Thomas J. Ahern, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District Jail.

By direction of

BOLITHA J. LAWS, C. J.
Presiding Judge
Criminal Court # Assign.

HARRY M. HULL, *Clerk*

By J. RUMSEY
Deputy Clerk

Present:

United States Attorney

By FREDERICK SMITHSON
Assistant United States Attorney

A. ARCENEUX
Official Reporter

167

Filed Dec 5 1951

Order

Upon consideration of the oral motion made herein by counsel for the defendant, no objection thereto being made by the government, for a further mental examination of the defendant, it is, by the Court, this 5th day of December, 1951.

ORDERED, that Dr. Benjamin Karpman shall be and he is hereby permitted to make a personal examination of the above-named defendant at the District Jail, and that the said examination shall be at the expense of the defendant.

IT IS FURTHER ORDERED, that the said psychiatrist shall file with the Court a written report of his examination, which shall include a statement of his conclusions as to whether the person examined is of sound or unsound mind.

BOLITHA J. LAWS

Judge

Seen:

FREDERICK G. SMITHSON

Asst. U.S. Attorney for Dist. of Columbia

* * * * *

170

Filed Jan 16 1952

Judgment and Commitment

On this 15th day of January, 1952 came the attorney for the government and the defendant appeared in person and¹ by counsel, Thomas J. Ahern, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of² not guilty and a verdict of guilty of the offenses of

Violation Sections 2901, 3202, 3204 D.C. Code

as charged³

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced,

and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴

Six (6) Years to Twenty (20) Years on Count One;

One (1) Year on Count Two; to begin at the expiration of the sentence imposed on Count One.

* * * * *

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS

1 Monday, January 14, 1952.

The above-entitled cause came on for hearing, before the Honorable Edward A. Tamm, Judge, and a Jury, at 10:00 o'clock, a. m.

* * * * *

4 **George Ralph Murray** was called as a witness for and on behalf of the Government and, being first duly sworn, was examined and testified as follows:)

Direct Examination

By Mr. Smithson:

* * * * *

Q. Were you so engaged as a taxicab driver on the morning of September 25th of 1951? A. I was.

Q. Directing your attention to about one or one-fifteen in the morning, where were you at that time, Mr. Murray?

A. One-fifteen a. m. on September 25th, I picked up
5 two white men at the corner of Thirteenth and G.

Q. What directions were you given by those riders? A. To be taken to Poor Joe's Restaurant, 4800 block of Georgia Avenue.

Q. That is 13th and G. Northwest, is that right? A. That is correct.

Q. That is a place within the District of Columbia? A. Yes. Northeast corner.

Q. And Poor Joe's Restaurant is located, you say, at 4801 Georgia Avenue, Northwest? A. That is correct.

Q. Likewise a place in the District of Columbia? A. Yes, sir.

Q. Do you see any of the persons who accosted you, or called your cab on that morning, here in Court today? A. Yes, I do.

Q. Will you point them out? A. This fellow sitting over here, later identified to me as Joseph Wagstaff. (Witness indicating.)

Q. This man here (indicating the defendant), was he present? A. That is right. Yes, sir.

Mr. Smithson: May the record indicate, Your Honor, that the witness has identified the defendant as one
6 of those who stopped his cab at that address at the time indicated?

The Court: The record will so indicate.

By Mr. Smithson:

Q. What did you do after you picked up these two fares? A. Proceeded north on 13th Street to Decatur Street.

Q. What block of Decatur, if you know? A. It would be the 1200 block of Decatur Street.

Q. Twelve hundred block of Decatur Street? A. Yes, sir.

Q. Is that Northwest, also? A. Yes, sir.

Q. Is that in the District of Columbia? A. Yes, sir.

Q. What happened then, sir, if anything? A. I was in the middle of the block between Georgia Avenue and Thirteenth Street when I was commanded to stop the cab.

Q. Do you know who commanded you to stop the cab?
A. Mr. Wagstaff.

Q. Is that the man you have just identified? A. Yes, sir.

Q. What was said or done at the time, sir? A. I didn't respond to his command immediately.

Q. What did he say to you, sir, if you recall?

7 A. He said "Stop the cab".

Q. All right. What did you do or say? A. I didn't respond immediately, stopping the cab. So he said "I said to stop this cab, if you don't want to get killed". I heard a click. I turned around, and he had a gun, and I put my brake on.

Q. Could you identify that gun, sir? A. Yes, sir.

Q. How would you identify it, sir? A. We later found it.

Q. No, sir. How would you identify it? Let's put it this way: Was it an automatic, or was it a revolver? A. At that particular time, I didn't know.

Q. If you know. A. I didn't know what it was. It was just a black object.

* * * * *

8 Q. (By Mr. Smithson) Following this sound, sir, what did you do then? What did you do, or say?

A. I turned around. I stopped the car real fast and turned around, and he had the gun in my face.

Q. Who had the gun? A. Mr. Wagstaff.

Q. Then what happened? A. He said to me he wanted my money, all my money—and he wanted all of it.

Q. Did you give him any? A. Yes, sir. I gave him \$10.60, all I had.

Q. Do you recall in what denominations the money was?

A. It was nine \$1.00 bills and a dollar-sixty in change.

Q. Then what happened, sir? A. He wanted to know if that was all the money I had. I told him yes, I didn't get started until late that night.

Q. What did he say then, if anything? A. He told me if I didn't want to get shot I would drive straight ahead, make no noise, and keep going.

Q. Then what happened? A. Then he and his partner got out of the back of the cab and started running up an alley.

Q. Do you know which direction they ran? A. They ran south in an alley.

9. Q. South in an alley. What did you do then, sir?

A. I immediately pulled—put my car in gear and picked up the microphone on my two-way radio, and called the dispatcher.

* * * * *

Q. Did you have occasion that same day to go to No. 6 precinct? A. Yes, sir.

Q. Did you see the men there at that time, Mr. Murray, who were in your cab, and who took your money at the point of a gun? A. Yes, sir.

Q. Was the defendant, Wagstaff, there? A. Yes, sir.

Q. Was he one of the men? A. Yes, sir.

Q. Were they questioned in your presence, sir? A. Yes, sir.

10 Q. Were both of them together at the time of the questioning, sir. A. Sitting in the same room.

Q. How close together, sir? A. Well, the length of the table. They were across from the table, maybe four—

Q. Can you pick out some—pardon me— A. About four or five feet width.

Q. Where were you with relation to them? A. Sitting at the end.

Q. Could you hear the conversation? A. Yes, sir.

Q. Do you recall who did the questioning? A. Corporal Nash was one of them.

Q. Do you recall the name of the other man, sir? A. His name was Osborne.

Q. Was there any statement made in your presence relative to this robbery? A. Yes, there was.

Q. Who made the statement? A. Mr. Osborne.

Q. And the defendant, Wagstaff, was present? A. Yes, sir.

11 Q. What was that statement? A. The statement that he identified me as the cab driver that him and Joseph Wagstaff had held up.

Q. Did he say who had the gun? A. He said Wagstaff had it.

* * * * *

Q. Would you state, please, the conversation, as well as you recall it, sir, at that time? A. At the police station?

Q. Yes.

The Court: Keep your voice up, so everyone can hear you.

A. They asked Osborne if he was ready to make a statement, if he wanted to make a statement of some kind. He said yes.

* * * * *

12 Q. Would you proceed, sir? A. The policemen brought Mr. Wagstaff in and sat him down at the table. Osborne was across the table and I was sitting at the end. Those police stood between the two of us. He wasn't promised anything, and no threats were made.

Q. What time in the day or night was this? A. Two-thirty a. m. on September 28th, at No. 6 precinct.

Q. What was the statement, as you recall? A. The statement was that he identified me as the cab driver, and implicated Mr. Wagstaff as the person having the gun.

Q. Did you see what they did afterwards? A. No, sir. I did not.

Q. Had you ever seen this defendant before? A. No, sir.

13 Q. Had you ever seen the other man before? A. No, sir.

Mr. Smithson You may inquire, sir.

Cross-Examination

By Mr. Ahern:

* * * * *

17 Q. Did you hear any police officer talk to him in that room? A. Asked him if he wanted to make a statement. He said no, he wanted to see his attorney.

Q. That is all you heard? A. That is all I heard. Yes, sir.

Q. Now, when you got to No. 6 precinct, was this defendant in No. 6? A. Yes, sir.

Q. And where were you? Who took you to No. 6? A. I drove my cab there.

Q. Did you go there yourself? A. I was told to go there from Georgia Avenue and Decatur Street.

Q. Over your phone? A. No, sir; by the policeman who was there handling the case.

Q. Were you present in the Commissioner's the morning of the hearing when Osborne testified? A. When Osborne testified? I was there one time.

Q. Did you hear Osborne testify in that case?
18 A. No, I can't recall it, sir.

Q. Did you hear the young officer with the light hair testifying—

The Court: This is at the Commissioner's?

Mr. Ahern: This is at the Commissioner's hearing. Yes, sir.

The Witness: Kind of bald-headed policeman?

Q. (By Mr. Ahern) I think he's the only one, Mr. Murray, who testified there. A. Yes, I heard him.

Q. I want to know if you heard him testify. A. Yes, sir.

Q. Did you hear that officer tell the Commissioner that Wagstaff was not with him?

Mr. Smithson: Objection to the question, Your Honor. I don't see that it is relevant to the testimony of this witness. It certainly would be hearsay and irrelevant.

The Witness: I don't recall.

Mr. Ahern: I submit—just a minute—I submit, Your Honor—well, he says he don't recall.

The Court: I think the objection becomes moot now. Don't answer the questions so quickly. Wait a minute, and give counsel a chance to object.

19 The Witness: Excuse me.

By Mr. Ahern:

Q. Well, I will ask you this, Mr. Murray: Do you recall Osborne telling the United States Commissioner that he told other detectives that Wagstaff wasn't with him?

* * * * *

20 The Witness: I don't recall hearing that, sir.

21 Q. How far away, Mr. Murray—I am not trying to confuse you, sir—were you from the witness who was testifying that morning? It is a small room. A. Approximately twenty feet.

Q. You could hear anything that was said there, could you not? A. I imagine, if I was listening close enough, but there was some low talking up there. Maybe I didn't hear it.

Q. To save time, did you hear any of the conversation between the Commissioner and that policeman, the only policeman who testified that morning? Did you hear any of that conversation? A. I heard him tell the story as it went on pertaining to the holdup.

Q. Did you hear him in the course of telling his story, state what Osborne had said to him and other policemen? A. No.

Q. You have discussed this case with the United States Attorney, have you not? A. He has asked me a few questions about the facts of the case. Yes, sir.

Q. How recently did you discuss it? A. Well, just before it came up for the first time, back in October I believe it was.

22 Q. Have you discussed it since that time? A. No, sir.

Q. I am going to ask you,—you testified before the Commissioner, didn't you, Mr. Murray? A. Yes, sir.

Q. I want you to please think when I ask this question: Do you remember Commissioner Lawrence asking you this question:

"The first time that you saw Wagstaff, was it in the precinct? The first time you saw Wagstaff, was it in No. 6 precinct?"

Do you remember his asking you that? A. Yes, sir.

Q. What did you say? A. And I told him I saw him at the corner of Georgia Avenue and Decatur Street when the police brought him back, then we later went to No. 6 precinct.

Q. Now, you remember the first question, then you told him that you saw him when the police brought him back. Is that right? A. That is correct.

Q. And then you saw him at No. 6? A. Yes, sir.

Q. That was your answer to the Commissioner
23 that morning? A. Yes, sir.

Q. You are not confused on it? A. No.

Mr. Ahern: That is all.

Redirect Examination

By Mr. Smithson:

Q. Is he the same man, sir, who was one of the two—

Mr. Ahern: I object.

The Court: You are interrupting counsel.

Mr. Ahern: No, I was going to say to your Honor I object to the form of the question.

The Court: The Court cannot pass on the question until it hears it. Ask the question, Mr. Smithson.

By Mr. Smithson:

Q. Is the defendant, Wagstaff, one of the two persons who got in your cab at 13th and G Streets, Northwest? A. Yes, sir.

Q. Was he the person who commanded you to stop, and held the gun? A. Yes, sir.

Q. You are certain of your identification? A. Yes, sir.

* * * * *

26 **Rufus T. Nash** was called as a witness for and on behalf of the Government and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Smithson:

Q. Would you state your full name, sir? A. Rufus T. Nash.

27 Q. And you are a Corporal in the Metropolitan Police Department? A. Yes, sir.

* * * * * * * *

29 Q. Did you question the man Wagstaff in the presence of the defendant—let me reword that. Did you question the man Osborne in the presence of the defendant, Wagstaff? A. Yes, sir.

Q. He was questioned in his presence? A. Yes, sir. He was questioned.

Q. About what time was it? A. At about, between two and two-thirty a. m., I should think. I don't remember distinctly. Possibly two-thirty a. m.

Q. Where were they at the time? A. In the squad room of No. 6 precinct.

30 Q. And were they together, or were they separated? A. They were together. They may have been sitting—seated differently, that is, located differently in the room, but they were in the same room, if that is what you have reference to.

Q. How far apart were they, would you state? A. It seems to me that one was sitting near the table and the other on a bench behind him.

Q. About how many feet apart? Would you estimate with some object in this room? A. Oh, I would say three or four feet.

Q. And did the witness Osborne make any statement? A. He did.

Q. And what was that statement?

Mr. Ahern: If Your Honor please, at this time I object to any statement made by Osborne, on the same grounds that I made it a moment ago.

The Court: The witness has testified that the statement was made in the presence of the defendant, Mr. Ahern.

Mr. Ahern: My objection goes to Your Honor, your instruction as to the way it must be received by the jury where there are co-defendants.

31 The Court: The Court will at the proper time in the case advise the jury that caution must be exercised in accepting testimony of an accomplice.

Mr. Ahern: Thank you, Your Honor.

Mr. Smithson: May the witness answer the question.

The Court: Read the question to the witness, Mr. Reporter.

(Thereupon, the question was read by the Reporter, as follows:

"Q. And what was that statement?")

The Witness: Why, he made a statement, a verbal statement, which was later reduced to writing, in which he admitted his part in the holdup, naming his accomplice.

By Mr. Smithson:

Q. Whose name was furnished? A. Joseph Wagstaff.

Q. Do you see the man known as Joseph Wagstaff present in the Court today? A. Yes, sir.

Q. Would you point him out? A. Right over there. (Indicating the defendant.)

* * * * *

32 By Mr. Smithson:

Q. Did you question Osborne relative to a weapon? A. Yes.

Q. And was any information furnished as to the presence of a weapon? A. Yes, sir.

33 Q. As the result of that information, did you recover a weapon? A. Yes, sir.

Q. What was the information furnished to you, relative to the whereabouts of that weapon?

Mr. Ahern: If Your Honor please, I think he should ask who furnished the information.

The Court: The first question is whether Osborne furnished any information relative to a weapon. I think it would be well for the purpose of the record to make your questions clearer.

Mr. Smithson: I will be glad to. Yes, sir.

By Mr. Smithson:

Q. Where did the man Osborne state the weapon to be?

A. He stated he threw it under a hedge at 13th and Crittenden, at the point of his arrest.

The Court: He said he threw it, Officer?

The Witness: Yes, sir.

Mr. Smithson: At this time, Your Honor, I would like to have this marked for identification, Government's Exhibit 1, and 1-A.

The Court: Let me see the exhibit.

The Deputy Clerk: Yes, Your Honor. (Hands gun to the Court, who checked the same.)

34 Mr. Smithson: I will state to the Court that I had checked it.

The Court: The Court is also cautious in checking weapons.

(Thereupon, the gun above referred to was marked Government Exhibit No. 1, and the cartridge clip Government Exhibit 1-A, for identification.)

By Mr. Smithson:

Q. I show you an object which has been identified—

Mr. Ahern: If Your Honor please, I object. All we have so far is that Osborne said he threw a gun under a hedge.

The Court: At 13th and Crittenden Street. That is correct.

Mr. Ahern: Yes, Your Honor. I don't know anything about this gun. I think he will have to go into it further.

The Court: Ask your next question, Mr. Smithson.

Mr. Smithson: Your Honor, I may have been a little ahead of myself. I believe I asked the officer, after the information was received, did he recover a weapon.

Mr. Ahern: If you did, I don't recall it.

The Court: The witness testified some time ago he recovered the weapon. Immediately following the
35 question, "Did you ask Osborne relative to a weapon?", the officer said he recovered the weapon. You may ask your next question.

By Mr. Smithson:

Q. Yes, sir. I show you an object which has been identified as Government Exhibit No. 1, and ask you if you have seen that before, Officer Nash? A. I have. Yes, sir.

Q. Where did you see it, and when? A. I picked this gun out from under the hedge at 13th and Crittenden Streets, Northwest.

Q. How do you identify that as the same weapon you picked up at the hedge? A. It was marked with the letter X on the handle.

Q. Did you mark it? A. Yes, sir.

Q. And what did you do with it? A. It was later, the following day, I believe, sent to our property clerk for safekeeping, as evidence.

Q. I show you an object which has been marked for identification, Government's Exhibit 1-A, and ask you if you have ever seen that before? A. I think this is the clip that came out. However, it is not marked, to my knowledge, I didn't mark it. I think this is the clip that
36 came from the gun.

Mr. Ahern: I will object to that, if Your Honor please—he thinks.

The Court: The objection is sustained.

By Mr. Smithson:

Q. At the time you recovered the weapon which you have identified as Government Exhibit 1, at 13th and Crittenden, Northwest, Officer, was there, or was there not a clip in the weapon? A. There was a clip in the weapon. Yes, sir.

Q. Did you ever show this weapon to Osborne? A. Yes, I did.

Q. Did he make any statement in the presence of the defendant, relative to that weapon? A. Yes, sir.

Q. And what was that statement? A. He stated that was the weapon that he had thrown under the hedge, and the weapon used in the robbery.

Q. Did he say where he got the weapon? A. It was given to him, he stated, by the defendant, Wagstaff.

Q. Did he say where and when? A. Shortly after the robbery occurred, while they were in an alley, I believe.

* * * * *

37 Q. Officer Nash, to the best of your recollection will you state what the man Osborne said relative to where he got the weapon, and when?

* * * * *

38 The Witness: The defendant Osborne told me in the presence of the other police officers and the defendant, Wagstaff, that Wagstaff gave him the gun a very short time after they had left the cab and started running. I don't recall he told me the exact spot, but it was a very short time after they had left the cab.

By Mr. Smithson:

Q. Did you question the defendant Wagstaff, or was he questioned in your presence? A. Well, I did not question him. I remember of him having been asked one specific question in my presence.

Q. What was that question?

Mr. Ahern: If Your Honor please, I am going to object. He says he did not question him. Now he is volunteering something separate and distinct from the question of the District Attorney, and I think it is improper.

The Court: I think the question is a proper one. The objection is overruled. Answer the question. What question was asked him?

The Witness: Whether or not he would make a statement, or whether or not he cared to make a statement.

By Mr. Smithson:

Q. And what was the answer of the defendant,
39 Wagstaff, if any? A. His answer was that he did not want to make a statement until after he had talked with his lawyer.

* * * * *

40 Cross-Examination

By Mr. Ahern:

Q. Corporal, as to the statements made to you by Osborne, did you reduce them to writing? A. They were reduced. Yes, sir.

* * * * *

44 Mr. Ahern: I will ask that this be marked for identification, may it please the Court.

Mr. Smithson: May it please the Court, I will consent to it being marked as a Government exhibit, if defendant's counsel has no objection.

Mr. Ahern: I would rather have it marked as my own exhibit, Your Honor.

The Court: Very well. Mark it as Defendant's Exhibit No. 1 for identification.

(Thereupon, the document above referred to was marked Defendant's Exhibit No. 1 for identification.)

45 By Mr. Ahern:

Q. Corporal, will you look at that statement, please—

The Court: This is Defendant's Exhibit No. 1 for identification that you are handing the witness, is it?

Mr. Ahern: Yes, Your Honor.

The Court: Very well.

By Mr. Ahern:

Q. Is that the statement reduced to writing— A. Yes, sir.

Q. —that Osborne made? A. Yes, sir.

Q. Did you accompany Osborne—when did he make this statement, Corporal? A. In the squad room of No. 6 after the arrest of Wagstaff.

Q. Did you accompany Osborne to headquarters the following morning? A. Yes, sir.

Q. Did you have a conversation with Osborne the following morning with some other officers, with reference to this statement? A. No, sir. I did not.

Q. Did you hear other officers having a conversation with Osborne with reference to this statement on the morning of his arraignment before the United States Commissioner? A. I can't say that I did.

Q. Are you sure you did not? A. I don't believe I did. I would say I am sure I did not.

Q. Did you take him into the Robbery Squad? A. No, sir.

Q. Osborne. A. No, sir. I didn't take him in there.

Q. Do you know who handled the case in the Robbery Squad? A. No, I don't. One of the detective sergeants there, but his name I don't recall.

Q. Well, you are an experienced police officer. Can't you tell us? Did you take him to the Robbery Squad? A. He was taken there prior to arraignment.

Q. By you? A. No, sir.

Q. By whom, sir? A. He was brought up there from the cell block in the police headquarters.

Q. Do you know by whom? A. I have no idea.

Q. How do you know he was brought up there? A. I saw him up there.

47 Q. You were in the Robbery Squad? A. Yes, sir.

Q. Are any of the Robbery Squad men here in this case? A. I believe so.

Q. What are their names, sir? A. I believe Sergeant Young is here.

Q. Is he in the Robbery Squad? A. I think so.

Q. And was he attached to that particular Squad that day? A. He was.

Q. I will now ask you to read this statement again, please, and—I want to ask you a question. Read it closely. A. (Witness—reads statement.)

Q. Was that statement read to Osborne after he signed it?

The Court: After he signed it?

Q. (By Mr. Ahern) I mean before he signed it. A. Yes, sir.

Q. Are you sure of that? A. I am quite sure.

Q. And you are the one—did you type this statement? A. No, sir.

Q. Who typed it? A. Private (Greaves).

48 Q. Under your supervision? A. Not necessarily.

He was in the room at the time of the questioning.

Q. Will you show me anywhere in that statement the name of Wagstaff,—anywhere? A. He only referred to him—

Q. I am asking you just one question—

Mr. Smithson: He is arguing with the witness, Your Honor. The witness started to answer a question.

The Court: You must let the witness answer your questions, Mr. Ahern. Restate your question to the witness.

By Mr. Ahern:

Q. Will you tell me, after looking at that statement, if the name Wagstaff is anywhere in the statement? A. No, sir.

Q. Now, did you talk to Murray, the cab driver? What precinct are you in, Corporal? A. No. 6.

Q. When the arrests were made, did Murray, the cab driver, come to No. 6, your precinct? A. Yes, sir.

Q. And you were in charge of this case, I take it? A. Well, the Robbery Squad was there, also.

Q. I mean up to that time, sir, you were in charge
49 of the case? A. I was, yes.

Q. Do you remember Murray coming into the room, the room in the rear of where the desk sergeant is, in No. 6? A. No, I don't remember that.

Q. Well, I will put it this way: After the arrests of the defendant and the co-defendant Osborne, where were they taken to? A. Well, Osborne was taken immediately after his identification to No. 6, and Wagstaff, I don't know. Now, I didn't arrest Wagstaff.

Q. Was Wagstaff in No. 6? A. He was.

Q. In the presence of Osborne? A. Yes, sir.

Q. In the presence of Murray? A. Yes, sir.

Q. And do you remember Murray being there A. I beg your pardon.

Q. Do you remember Mr. Murray, the cab driver, being in that room? A. Yes, sir.

Q. Did you identify to Murray this man as Joseph Wagstaff? A. Did I identify him?

50 Q. Yes, sir. A. I don't believe I did. No, sir.

Q. Did you hear anyone? There were other men in that room? Who did you say accompanied you?

The Court: I think you have three questions before the witness now. Just ask one at a time.

By Mr. Ahern:

Q. Who was with you at the time that you made the arrest? A. Private Arthur L. Dalton.

Q. Now, who did you and Dalton arrest? A. Osborne.

Q. Where did you take Osborne immediately upon his arrest? A. Georgia Avenue and Decatur.

Q. Now, did you not arrest Wagstaff? A. No, sir.

Q. Who did, if you know? A. Two police officers from No. 10. Their names, I don't—

Q. They are here? A. They are here. Yes, sir.

Q. Did they bring Wagstaff to your precinct? A. He was brought there, I think, by them.

Q. And Mr. Murray was there? A. Yes, sir.

51 Q. Now, did you do anything with reference to Wagstaff and Murray in the presence of other officers when Mr. Murray came there?

Mr. Smithson: Your Honor, could the Reporter read that question back? I didn't quite understand it.

The Court: Mr. Reporter, will you read the question?

(The pending question was read by the Reporter.)

Mr. Smithson: Objection, Your Honor—too vague.

The Court: I think the question is vague. I think you will have to be a little more specific, Mr. Ahern.

By Mr. Ahern:

Q. Was Mr. Murray in the precinct when you got there?
A. Mr. Murray, I believe, went there at the same time I did.

Q. And where did you first see him? A. I first saw Mr. Murray at Georgia and Decatur.

Q. Now, after Mr. Murray got there, there came a time that Wagstaff came into that squad room, is that right? A. Yes, sir.

Q. Now, did you have any conversation with Mr. Murray with reference to Wagstaff? A. Yes, sir.

52 Q. Did you say to Mr. Murray: "This is Joseph Wagstaff"? A. No, sir. I don't think I did.

Q. Did you hear any other officer say that to Mr. Murray?
A. I can't say positively that I did hear it said in just those words.

Q. I don't understand you, sir. A. I may have heard, I think I did hear Wagstaff identified to Mr. Murray, but the words, I am not sure about.

Q. Who identified him to Murray? Was it a police officer?

A. It was a police officer, I am quite sure. The name, though, I can't tell you.

Q. Now, will you try and refresh your recollection, and tell me, tell His Honor, the Judge, and me, what you heard some officer say with reference to Mr. Wagstaff? A. I don't understand what you mean, Mr. Ahern.

Q. Well, you said now, a moment ago you said that you do recall that Mr. Wagstaff was identified to Murray by someone, did you not? A. I believe that is true. Yes, sir.

Q. What I am trying to find out, if you can tell us who identified him to Mr. Murray, if you know? A. I don't think I can.

53 Q. Now, the next morning, when you went down to headquarters, did you talk with Osborne about this statement? A. No, sir. I didn't.

Q. Did you hear anyone talk to him about the statement? A. I remember of someone talking with him, yes.

Q. Was he a plainclothes man? A. He was a plainclothes man.

Q. Was it Young? A. I don't think so.

Q. Was it Roach? A. I remember Roach being in the room.

Q. Was it Bonacorsy? A. No.

Q. You don't remember who it was? A. No, I don't. Officer Young might be the one, but I can't recall at the moment.

Q. And do you not remember the conversation, or the purport of the conversation? A. No, sir.

Mr. Ahern: Will our Honor indulge me just one minute?

Q. (By Mr. Ahern) Were you present at the Commissioner's hearing on the morning of the arraignment
54 over there for the purpose of the Commissioner's function? A. Yes, sir.

Q. Were you in the room during the cross-examination of a light-haired officer, young officer? A. Yes, sir.

Q. Could you hear that—did you hear that conversation?

A. I would say that I did. I was right there.

Q. You were standing right over by the door, were you not? A. In the hearing, in the arraignment itself, is that what you have reference to?

Q. I am talking about the hearing. A. In the arraignment, now?

Q. Yes. A. I was seated in the back of the room.

Q. And you could hear everything that was said? A. I think so.

Q. Did you hear the young officer—by the way, is he with you?

The young officer who was on the stand. There was only one officer who took the stand, Corporal. A. He's not in Court, —because he's sick.

Q. Do you remember him testifying? A. Oh yes, I remember.

55 Do you remember his saying that Osborne told him that he wanted to change the contents of that statement? A. No, sir. I wouldn't say that he didn't say it, but I don't recall it.

Mr. Ahern: That is all, sir. I reserve the right to read this to the jury at a later time, with Your Honor's permission.

The Court: If it is admitted in evidence.

Mr. Ahern: Yes, sir. I offer it now.

Mr. Smithson: No objection. None whatsoever, because I would like to examine the witness relative to the statement.

The Court: Very well. If there is no objection, the statement will be admitted in evidence as Defendant's Exhibit 1.

(Thereupon, the document previously marked Defendant's Exhibit No. 1 for identification was received in evidence as Defendant's Exhibit No. 1.)

The Court: Do you have any further questions?

• • • • •

56 Q. Did the man Osborne at any time ever indicate, by words or gestures, who accompanied him and who was present in the cab at the time of the holdup? A. He indicated with the name Joe, in other words he named as his accomplice, Joe.

Q. And did he indicate him by any other means at any time? A. Well, later on, when the statement was reduced to writing, and in the statement, in the presence of the defendant here, he identified this man as being the person referred to as Joe.

Q. Did he ever tell you when he first met the defendant, Wagstaff? A. Yes. He said he met him that afternoon, I believe, as well as I remember now; that he stated that was the first time he had ever seen him, that afternoon, or in the evening, I believe, that when he had gone to pay a light bill, as well as I remember, he met him at 10th and E, Northwest.

Q. I show you Defendant's Exhibit No. 1, to refresh your recollection. And does the statement of the man Osborne refer to a Joe? A. Yes, sir.

Mr. Smithson: With the permission of the Court, I would like to read the statement into evidence.

The Court: You may read it.

57 (Thereupon, Counsel for the Government read to the Jury, the contents of the statement of Richard Howard Osborne, September 25, 1951, previously identified and received in evidence as Defendant's Exhibit No. 1.)

The Court: Any further questions of the witness?

Mr. Smithson: Yes, if I may, Your Honor.

By Mr. Smithson:

Q. Did you search the defendant, Osborne, or was he searched in your presence? A. No, I didn't search him. I don't believe he was, in my presence. I frisked him at the time of his arrest.

Mr. Smithson: I would like to offer in evidence, if Your Honor please, Government Exhibit No. 1, consisting of 45 Colt automatic.

Mr. Ahern: I will object to it, if Your Honor please.

The Court: State the grounds of your objection.

Mr. Ahern: This is a gun, according to the Corporal, that was in the possession and hands of a co-defendant, and who told the officer that he, the co-defendant, had hid a gun behind some hedge.

Now up to the present time, I certainly do not feel that there is sufficient evidence to connect this defendant with the co-defendant, or any statement that he made.

58 My position is, if Your Honor please, that this gun might be permitted to go in evidence by Your Honor at a later time, but certainly not at this particular time.

* * * * * * * *

The Court: I think your objection, Mr. Ahern, goes to the weight of the testimony, rather than its admissibility. The Court will deny your objection and admit Government Exhibit No. 1 in evidence.

* * * * * * * *

59 Recross-Examination

By Mr. Ahern:

Q. I think I asked you, Corporal, if this statement was made under your supervision? A. You did. —Yes, sir.

Q. And your answer was that it was? A. I believe so. I think I said not necessarily so, that I was there.

Q. The purpose of this written statement was to corroborate any oral statement that you might testify to in this case?

Mr. Smithson: Object to that question, Your Honor. The statement speaks for itself.

The Court: The objection is sustained.

Q. (By Mr. Ahern) You knew that this statement, that this written statement—you knew that you might be examined on this written statement, did you not? A.

60 Well, I had a good idea that I probably would. That is generally true.

Q. And at no time did you ask for any further identification of a co-defendant, other than the name of Joe?

The Court: That is the way the question was phrased.

A. I don't believe that I asked personally for any further identification.

Mr. Ahern: That is all, sir.

* * * * *

61 Further Recross Examination

By Mr. Ahern:

Q. Now, was that before this statement was written? A. I don't think so. That was after the statement had been reduced to writing, after his verbal statement had been reduced to writing, I am quite sure of that.

Q. Well, why didn't you put it in writing? A. Well, the only reason I can give you is that it had most likely already been written up, and was not changed.

Q. Well, you could have easily written up another sheet of paper, couldn't you? A. Another could have been; yes, sir.

62 Q. But you didn't do it? A. Didn't do it. No, sir.

* * * * *

62 **James M. Jackson** was called as a witness for and on behalf of the Government and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Smithson:

Q. Will you state your full name, sir? A. James M. Jackson.

* * * * *

64 A. We cruised the alley in the vicinity where this holdup took place.

Q. Can you identify the alley? A. Yes, sir.

Q. Where? A. It is the alley that runs between Decatur and Crittenden Street, Georgia and 13th.

Q. Did you see anyone in that alley? A. Yes, sir.

Q. Who? A. Saw two men in the far end of the alley as we were cruising there.

Q. What did you do then? A. My partner got out of the car and approached them on foot, and I went around with the car to head them off at the other end of the alley.

Q. When you got to the other end of the alley, what did you do there? A. When I pulled into the alley, I saw two men. I got out of the car—jumped out of the car—

Q. Keep your voice up. A. I ordered them to hold
65 their hands up, and they did. I proceeded to search

Wagstaff here, and just as I finished searching him for the gun—I was looking for the gun—and started to search Osborne, Wagstaff whirled and grabbed me by the muscles of each arm, and he said to Osborne “Get the gun, Eddie.” I didn’t have it. So I stood there for a minute. I watched him, and he didn’t do anything. And he hollered at him and again said “Eddie, get the gun. Let him have it.” At that point he reached down and pulled a gun out of his shoe.

Q. Who do you mean? A. Osborne. When he came up with the gun, he dropped it out in front of him. That is when I broke away from Wagstaff, ducked behind a car and drew my gun. At that point Officer Young arrived there. I told him they had a gun. He fired a couple of shots at them, and I fired a shot at them. We chased Osborne down the alley and he was apprehended by a car from No. 6.

Q. What about the other man? A. He ran a different direction. We lost him, because he ducked behind some cars, but he was picked up later.

Q. The man you met in the alley, and the man who held your hands, do you see him sitting in Court today? A. Yes, sir.

Q. Would you point him out? A. Yes, sir. Right over there. (Indicating.)

66 Q. Is this (indicating the defendant) the man you saw in the alley? A. That is him.

Q. Is he also known to you under the name of Wagstaff?
A. Yes, sir.

Mr. Smithson: May the record indicate, Your Honor, that the witness has identified the defendant?

The Court: The record will so indicate.

By Mr. Smithson:

Q. When did you discover the defendant's name, sir? A. After he was arrested, in No. 6.

Q. He is the same man you saw in the alley? A. He is the same man. Yes, sir.

Q. Do you know a man by the name of Osborne? A. Yes, sir.

Q. Was the man Osborne with the defendant Wagstaff in the alley? A. They were both together there. Yes, sir.

* * * * *

68 **Douglas M. Smith** was called as a witness for and on behalf of the Government and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Smithson:

Q. Would you state your full name, sir? A. Private Douglas M. Smith.

Q. Are you a member of the Metropolitan Police Department? A. I am, sir.

* * * * *

69 Q. Did you find anyone? A. Yes, sir. We were going south on Georgia Avenue, and we made a right turn onto Crittenden Street, and as the headlights of the squad car went around the turn, they picked out a white man crouched behind a parked automobile.

Q. What did you do? A. I immediately stopped the squad car, got out and approached this man.

70 Q. Did you say or do anything at that time, or did he say or do anything? A. He came out from behind the car just about the same time I started getting

out. He had both hands raised in the air. He said "Here I am. I am your man".

Q. Do you see the person who made that statement sitting in the Court room today? A. This is the man here. (Indicating the defendant.)

* * * * *

71 Q. When did you determine, or how did you determine—let me rephrase the question. How and when did you determine the name of the defendant? A. Well, at the scene. After he had made the statement: "Here I am. I am your man", he said "You know me. I am Wagstaff."

Q. Where did you question the man, or where was he questioned in your presence? What time and place, please? A. Well, after that he was taken to the Sixth Precinct, and a little bit after two o'clock he was questioned in my presence, at the top of the stairway leading from the side entrance of the Sixth Precinct into the station clerk's desk.

72 Q. Who questioned him? A. Well, I asked him if he had the gun.

Q. Did he say whether or not he had the gun? A. He said "I do not have the gun with me." He said "I don't have any gun."

* * * * *

73 Q. Officer, did the defendant, Wagstaff, in response to questioning at No. 6 Precinct, make any statement relative to the robbery of the cab driver known to you as Murray? A. The only thing that he would state was "I want to see a lawyer."

Q. What was that? A. The only thing he stated that I heard was "I want to see a lawyer".

* * * * *

77 Cross-Examination

By Mr. Ahern:

* * * * *

80 Q. What did you say to the man? A. Well, before I had a chance to say anything to him, he made the statement "Here I am. I am your man."

Q. What did you say? A. I questioned him at that time: "Who are you? What do you mean?"—not wanting to arrest an innocent person, I mean, or embarrass
81 anybody, and still do good police work, I mean I wanted to ascertain just who it was that he was talking about, and he seemed to think I should know him. "I am Wagstaff", I mean, as if that explained everything.

Q. So he said to you "I am Wagstaff"? A. Yes, sir.

* * * * *

83 Q. You had no further conversation with Wagstaff, other than what you have related, which took place at the car; is that right? A. Well, I had the conversation of asking him about the gun, about locating the gun.

Q. You asked him? A. Wagstaff, yes.

Q. About the gun? A. Yes, sir.

Q. Where was that, in No. 6? A. Yes, sir.

Q. What did you say? A. I asked him if he had the gun, or if he would tell us where the gun was, and he stated, "Hell, no. I am not going to tell you. After all, I am a three-time loser."

Q. Now, you are sure, now, of what he said? A. Well, words to that effect. I mean, the portion of "I am
84 a three-time loser", that was definitely in there. Whether he used the word "Hell" or not, I am not certain.

Q. Well, did he say to you "I know nothing about the gun."? A. No, sir.

The Court: What is your answer?

The Witness: No, sir.

Q. (By Mr. Ahern) Well, can you tell us what he said about the gun when you asked him about the gun? A. He said "You don't expect me to tell you. After all, I am a three-time loser."

Q. That is what he said to you? A. Yes, sir.

Q. Did you ask him any further questions? A. No, sir. I did not.

Q. Were you there when he was booked? A. Yes, sir.

* * * * *

87 **William C. Greaves** was called as a witness for and on behalf of the Government and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Smithson:

Q. Will you state your full name, sir? A. My name is William C. Greaves; private, No. 6, Police.

* * * * *

88 Q. While you were there, sir, did you see a man brought there later identified to you by the name of Osborne? A. I did.

Q. Did you search him, sir? A. He was removed from Georgia and Decatur Street to No. 6 precinct, where he was searched.

Q. Who searched him? A. I did.

Mr. Smithson: If it please the Court, I would like to have this marked for identification, Government's Exhibit No. 2. For the record, it includes the envelope and all the contents thereof.

The Court: Very well.

(Thereupon, the envelope and contents thereof was marked Government Exhibit No. 2 for identification.)

By Mr. Smithson:

Q. Officer Greaves, I show you an envelope which has been marked Government Exhibit 2 for identification, and ask you to examine the envelope and the contents thereof. A. May I state there should be nine \$1.00 bills—

Mr. Ahern: I object to this, Your Honor.

The Court: Don't volunteer any information. Just answer the questions.

The Witness: Yes, sir. (Examines Government
89 Exhibit No. 2, envelope and contents).

By Mr. Smithson:

Q. I believe you stated, sir, that you searched the man, Osborne? A. I did.

Q. Did you take any property from him, sir. A. Nine dollars in one dollar bills, \$1.60 in change.

Q. What did you do with it, sir? A. Deposited it in an envelope and left it as evidence.

Q. And I ask you to examine the contents of Government Exhibit No. 2, and state what they are, and where you obtained them? A. Nine \$1.00 bills and \$1.60 in change.

Q. Where did you obtain that? A. At No. 6 precinct, from Osborne. Q. You took it from the defendant? A. I took it from Osborne.

Q. From the man, Osborne? A. From the man, Osborne.

Q. And you placed it in the envelope? A. I placed it in the envelope.

Q. Is that the same envelope? A. That is the same envelope.

90 Mr. Smithson: I move the admission of Government Exhibit No. 2 in evidence, Your Honor.

The Court: Is there any objection?

Mr. Ahern: No objection.

The Court: It will be admitted as Government Exhibit No. 2.

* * * * *

Thomas V. Slomanski was called as a witness for and on behalf of the Government and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Smithson:

Q. Would you state your name, sir? A. Lieutenant Thomas V. Slomanski.

* * * * *

91 Q. Have you had occasion to check the records within the Metropolitan Police Department relative to a permit to carry weapons, of a Joseph A. Wagstaff? A. I have, sir.

Q. When did you make this check? A. I think the original date was about the 26th or 27th of September of last year.

Q. Have you made a more recent check, sir? A. I am continually checking the records, sir.

Q. Sir, can you state to the Court and the ladies and gentlemen of the jury, did the defendant, Joseph A. 92 Wagstaff, on September 25th, 1951, or at any time since then, possess a permit to own and carry a pistol on the streets? A. Joseph A. Wagstaff did not at that time, prior to that time, or since that time, have a permit to carry a gun in the District of Columbia.

Mr. Smithson: You may inquire.

* * * * *

98 **Richard Osborne** was called as a witness for and on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ahern:

Q. Your name, please? What is your name, please, sir? A. Richard Osborne.

The Court: Keep your voice up. Talk real slowly, real loud and real clear, so everyone can hear you and 99 understand you. Go ahead.

Q. (By Mr. Ahern) On the morning of September 25th of this year, did you have occasion to get into a taxi-cab? A. Yes, sir.

Q. What time of the morning was it, sir? A. It was about twelve-thirty or one o'clock; some time in there.

Q. And was there somebody in the cab with you? A. Yes, sir.

Q. And did you know that person? A. Yes, sir. I did.

Q. And where did you meet him? A. I met him downtown that day, but I knew him previous to that time.

Q. I will ask you now, stand up. Is this the man who was in the cab with you (indicating the defendant)? A. No, sir.

Mr. Ahern: You may examine.

Cross-Examination

By Mr. Smithson:

Q. Did the man who was in the cab with you have a moustache on? A. Yes, he did.

100 Q. When was the first time—I withdraw that question—you were questioned at No. 6 precinct, were you not, relative to a robbery of a cab driver in front of the 1200 block of Decatur Street, Northwest? A. That is right.

Q. And you gave a signed statement, did you not, to the Police Department? A. Yes, I gave them a statement.

Q. In fact, sir, you plead guilty, did you not, sir, to that crime? A. That is right.

Q. And I show you Defendant's Exhibit No. 1, and ask you to examine the signature at the bottom. And read the statement, too, if you will. A. (Witness reads statement.)

Q. Is that your statement, sir? A. Yes, that is.

Q. Did you sign that statement? A. Yes, sir.

Q. Are the contents of that statement true and correct as they are set forth? A. Not entirely, no.

101 Q. What part is wrong? A. Well, the part about pulling the trigger on the gun was not true.

Q. You didn't pull the trigger on the gun? A. No, sir.

Q. When did you meet the man who accompanied you that night, or early morning? A. You mean the first time I met him?

Q. Yes. A. Oh, about two, three months after I got discharged from the service.

Q. I can't hear you.

The Court: Keep your voice up. Talk loudly.

A. Couple of months after I was discharged from the service.

Q. (By Mr. Smithson) What day, if you can recall, or what month? A. I don't remember.

Q. Was it the month of September, 1951? A. No, sir.

Q. Was it before that? A. Yes, sir.

Q. You stated, did you not, to Officers Nash, Greaves and Dalton: "I did not know Joe was going to hold up anybody until we got near Poor Joe's. I never saw this boy Joe until this afternoon"? You said that, did you not? A.

I don't remember saying anything like that.

102 Q. I ask you to look at the last paragraph of this statement, sir, that you signed. It appears there on the statement, does it not, sir? A. It is there.

Q. It is there? A. It is.

Q. You signed that statement, sir? A. I signed it after they beat me up.

Q. Oh, they beat you up? A. Yes, sir.

Q. Who beat you? A. Precinct detective.

Q. Who? A. I don't know his name.

Q. What does he look like? A. Big fellow.

Q. Big fellow? A. Yes.

Q. How big, bigger than I am? A. Lot bigger than you.

Q. Do you know his name? A. No, sir. I do not.

Q. Officer Young, stand up. (Officer Young arose.) Is that the man? A. I couldn't recognize him, sir.

• • • • •

105 Q. He was seated in the squad room with you at a table? A. No, sir.

Q. He wasn't in that room? A. Not while I was questioned.

Q. At any time while you were questioned? A. The only time he was with me was when they asked me if that is the man with me, and I said no.

106 To whom did you say that? A. To one of the officers.

Q. What officer? A. There were a lot of them around there.

Q. Have you seen him here today? A. No, sir.

Q. Did you ever say that at any other time to any officer who is present here today, or any other officer? A. Well, I told them at detective headquarters. They asked me if that was the man. I said no.

Q. Will Sergeant Young stand again, please. (Sergeant Young arose.) Did you see that man at the Robbery Squad, Headquarters, Metropolitan Police Department? A. I don't know. There was a bunch of them around.

Q. And you can't identify that officer that you told this to, by any other statement than that? A. No.

Q. Is that your answer No? A. That is right.

Mr. Smithson: That is all.

The Court: Any further questions, Mr. Ahern?

112 The Court: Just a minute. Does the Government request any special charges?

Mr. Smithson: I don't believe so, Your Honor.

The Court: Now, Mr. Ahern.

Mr. Ahern: Only one, Your Honor, if you think it is appropriate.

The Court: I am going to charge on accomplices. If you request me to do so, I think the Court is obliged to do it. Although at the present time the testimony of the accomplice, Osborne, in this case, implicates the defendant, nevertheless, in the light of the objections you made, the

Court must charge on receiving the testimony of an accomplice with care.

Mr. Ahern: I have no objection to your usual instructions, Your Honor. There is only one that gives me a little concern. There is a case that holds that mere presence at the scene of a crime is not sufficient to convict. I think Your Honor is familiar with the case. I am having it looked up.

The Court: I will tell you what I am going to do. In order that we will not have any pressure or coercion on the jury in the returning of a verdict, I will permit you to conclude your argument, and I will charge the jury
113 at ten o'clock tomorrow. I will call you to the Bench before I charge them, so you can give me what you want to have in the way of a charge with reference to presence at the scene of a crime.

Mr. Ahern: That is the only thing, Your Honor.

The Court: Is there anything else you specially request?

Mr. Ahern: I make the usual request for a charge in connection with the fact that the defendant did not take the stand. I will look this other one up so I can present that to you.

The Court: You can present it in the morning.

* * * * *

114 The Court: Will Counsel approach the Bench?

(Thereupon, Counsel and the Reporter approached the Bench and, out of the presence and hearing of the jury, the following proceedings were had:)

The Court: I notice an order, Mr. Ahern, dated December 5th, that calls for an examination of this defendant by a doctor. Was that action taken? Was he examined?

Mr. Ahern: No, he wasn't examined by that Doctor, Your Honor. He was examined by Doctors—

Mr. Smithson: Gilbert and Peretti.

Mr. Ahern: Peretti and Gilbert, and they found him of sound mind.

The Court: I found those examinations in the file.

Mr. Ahern: But there was another doctor. He had Dr. Kline.

The Court: This was an examination apparently at the defendant's request, by a doctor of the defendant's selection. That examination was made?

115 Mr. Ahern: Dr. Kline made it, and he found him of (psychotic) personality—

The Court: But of sound mind?

Mr. Ahern: Of sound mind.

The Court: Very well. I just wanted to be sure the order had been complied with. That is all. Very well, we will adjourn.

* * * * *

116 Tuesday, January 15, 1952.

The hearing in the above-entitled cause was resumed, before the Honorable Edward A. Tamm, Judge, and a Jury, at 10:00 o'clock, a. m.

* * * * *

117 The Court: Does the Government request any special charges?

Mr. Smithson: No special charges, sir.

The Court: Mr. Ahern?

Mr. Ahern: I would like to address myself to one thing, probably two. Your Honor indicated yesterday in view of my examination, that instruction would be given on an accomplice. I read some law on it last night and this morning, and I think I would ask Your Honor to say that if they should find—would that be all right, in view of the nature of the identification—

The Court: That is right. Whether the relationship of Wagstaff to Osborne is that of an accomplice, is a question of fact for the jury to determine. If upon the face of the testimony they conclude that they are accomplices, then they should consider the testimony of Osborne with caution.

118 Mr. Ahern: That will be fine, Your Honor. Now, there is one more thing, as to whether or not Your Honor would give an instruction as to the mere presence.

The Court: What specific instruction do you request, Mr. Ahern?

Mr. Ahern: I ask Your Honor, would you consider giving the instruction that the presence of the defendant at the scene of the crime is not sufficient evidence—

The Court: Is not in and of itself.

Mr. Ahern: Is not in and of itself sufficient. Now, there are several cases along that line. I feel in view of all the circumstances of the case, I am correct in asking Your Honor if you would give that type of instruction. In view of Osborne's testimony that he wasn't there at all at the robbery, I mean, although he was found in the vicinity of the crime later, I think I am entitled to that instruction.

(Further discussion omitted.)

The Court: The Court will charge that the mere presence of the defendant at the scene of the crime is not in and of itself sufficient to prove the commission of the crime, but it is a factor which the jury should consider together with all of the other evidence in the case. Is that satisfactory?

Mr. Ahern: Yes. That is very fine, Your Honor.

The Court: There is one further evidentiary element the Court has given some thought to, and that is the
119 testimony of the officer, who said that the defendant stated that he was a three-time loser.

Mr. Smithson: Officer Smith, Your Honor.

The Court: Officer Smith.

Mr. Ahern: I am worried about that.

The Court: Which raises the question of criminal record. The matter of criminal record is something in reference to which the generally accepted charge of the court is that if the defendant takes the stand, and so on. The Court will attempt to charge in effect that the guilt or innocence

of this defendant must be determined by the evidence in this case, and in this case alone.

Mr. Ahern: Yes, Your Honor.

(Brief discussion off the record.)

Mr. Smithson: If the Court recalls, my statement to the witness, when I asked him, "Did you talk to this man?" was whether or not he talked to him about a gun.

The Court: That is right. It was brought out in cross-examination.

Mr. Smithson: That is right.

Mr. Ahern: One last thing: The Court will give an instruction that the fact that the defendant has not taken the stand, is not to be considered against him?

The Court: The Court will so charge.

* * * * *

Charge to the Jury

120 The Court: Ladies and gentlemen of the jury:

The presentation of evidence in this case being completed, the arguments of counsel being completed, it now becomes the Court's responsibility to charge you as to the law that will govern you in reaching your verdict in this case. It is your responsibility to accept the law as it is outlined to you by the Court.

Remember that the statements of counsel for the Government and for the Defendant, do not constitute evidence. You are not bound by the recollection or the restatement of the evidence as made to you by counsel for the Government or for the Defendant. You must consider this case upon the basis of the testimony which the witnesses have given from the witness stand, plus those exhibits which the Court has admitted in evidence, and the instructions which the Court will now give to you. If in the course of this instruction to you, the Court has occasion to refer to any of the evidence, you must remember that the Court's recollection of the evidence is not binding upon you. It is your recollection of the evidence, and your recollection alone, which must prevail in reaching your verdict in this case.

When you retire to your jury room, you will take
 121 with you a copy of the indictment which has been
 returned by the grand jury in this case. The purpose of the indictment is to inform the defendant of the charge or charges which have been preferred against him, the charge or charges which he must answer when he comes into court. An indictment is not evidence against a defendant. You should not consider this indictment as being evidence against this defendant. In other words, this indictment is entitled to no probative weight in connection with your deliberations.

The indictment in this case is drawn in two counts. It charges first that this defendant on or about September 25, 1951, within the District of Columbia, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of George R. Murray, property of George R. Murray of the value of about \$10.60, consisting of the following: \$10.60 in money. The indictment charges that this offense was committed jointly by this defendant and one Richard H. Osborne. Osborne's case has been disposed of. There is nothing in the case insofar as the guilt or innocence is concerned that requires any affirmative action upon your part with reference to the defendant Osborne. The testimony of Osborne as a witness in the case is, of course, before you.

The indictment charges that Wagstaff and Osborne were armed with a pistol. The second count of the indictment
 122 charges that on or about September 25, 1951, within the District of Columbia, Joseph A. Wagstaff and Richard H. Osborne carried a pistol on or about their person without a license having been issued, as provided by law.

The indictment, consequently, charges two offenses: First, a robbery armed with a pistol; second, the carrying of a pistol without a license having been issued as required by law.

The law is that each defendant is presumed to be innocent, and this defendant is presumed to be innocent unless and until the Government maintains its burden of proof and proves him guilty beyond a reasonable doubt. This means, ladies and gentlemen, that the Government is required to prove the defendant guilty of the charges beyond a reasonable doubt. It means that the defendant is not required to prove his innocence. The Government is required to prove his guilt. Unless the Government sustains this burden of proof and proves beyond a reasonable doubt that this defendant has committed each and every element of the offenses charged, then you, the jury, must find the defendant not guilty.

Now, I said to you that the burden of proof is on the Government to prove the defendant guilty beyond a reasonable doubt. But this does not mean beyond all doubt whatsoever. In other words, the Government must prove the defendant guilty to a moral certainty, and not to an absolute certainty.

As its name implies, a reasonable doubt is a doubt
 123 for which you can give a reason to yourselves, that is, a doubt based on reason, not on conjecture or speculation. Proof beyond a reasonable doubt simply means this: If after an impartial comparison and consideration of all of the evidence in the case you can say to yourselves that you are not satisfied of the defendant's guilt, then you have a reasonable doubt and should find the defendant not guilty. If, however, after this fair and impartial comparison and consideration of all the evidence in the case you can truthfully say to yourselves that you have an abiding conviction of the defendant's guilt, such as you would act upon in the more important and weighty matters in the course of your own daily lives, then you have no reasonable doubt.

In determining whether the Government has established the charges against this defendant, you must consider and weigh the testimony of all of the witnesses who have ap-

peared before you. You are the sole judges of the credibility of the witnesses. This means you must determine which witnesses to believe and to what extent to believe them. In determining whether to believe the testimony of any witness and in deciding how much weight to give to the testimony of such witness, you may consider the demeanor of the witness on the witness stand, his manner of testifying, whether the witness impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection of the

124 facts about which he has testified, and whether the witness has an interest in the outcome of the case.

All of these factors you may consider, as well as any other factors which appear important to you in reaching your determination as to whether the witness is telling the truth or telling a falsehood. If you find that any witness wilfully testified falsely as to any material fact concerning which that witness could not possibly be mistaken, then you are at liberty, if you deem it desirable to do so, to disregard the entire testimony of that witness or any part of the testimony of that witness.

The law recognizes a relationship between individuals who set out to accomplish a common objective, as accomplices. An accomplice is anyone who knowingly and voluntarily cooperates with, aids, assists, advises or encourages another in the commission of a crime. It is a question of fact for you to determine whether the defendants Wagstaff and Osborne are accomplices. If you find in your deliberation and upon the basis of the evidence before you that Wagstaff and Osborne are accomplices, you are, of course, entitled to consider the testimony of Osborne as being that of the testimony of an accomplice of this defendant. It is the duty of the Court to admit the testimony of an accomplice and that of the jury to consider it.

125 It should, however, be received with caution and scrutinized with care. The degree of credit which should be given such testimony is a matter exclusively within the province of the jury.

There has been some testimony in this case of certain statements made by Osborne allegedly in the presence of the defendant, Wagstaff. This testimony is admitted because it is the experience in law that if a statement is made concerning the participation in a crime by another individual, the statement being made in his presence and he fails to deny that statement, his failure to deny the statement constitutes an admission. An admission is a concession or acknowledgment by a party of the existence of certain facts. The silence of a party in a particular set of facts and circumstances may constitute an admission by that party. Evidence of silence may be used against the silent party as evidence of an admission, where the silence is improper and unnatural. For you to consider the silence of this defendant as evidence of an admission, there are certain conditions which must be met. First, a reply must have been natural and proper, and the party must have had knowledge of the stated facts and an opportunity sufficient to enable him to reply. The statement of the accused person must have been made in the presence of the other party. It must have been made with reference to facts about the other party, the facts relating to the rights of the silent party. It must have been heard and understood by the silent party, who had an opportunity to reply
 126 but did not reply. It must have been about facts, the truth of which was known to the questioner, and it must have been made by a person who is entitled to the information sought.

The law is that the presence of a defendant at the scene of a crime is not in itself sufficient to prove the commission of the crime. But the presence of the defendant at the scene of the crime is a point of evidence which you may and must consider in connection with all of the other evidence in the case.

The guilt or innocence of this defendant must be determined by you on the basis of the evidence in this case, and in this case alone. You are further instructed that no in-

ference of guilt arises against the defendant because of his failure to testify as a witness in his own behalf. The law provides that a defendant may if he sees fit not be a witness in his own behalf. You are not permitted to draw any inference from this fact. Obviously, the purpose of the law would not be accomplished if the defendant were permitted not to testify and if you were permitted to draw any inference therefrom. Consequently, the Court points out that no inference of guilt arises against the defendant because of his failure to testify as a witness in his own behalf.

It is the duty of the Court to make known to you the law of the case, and it is your duty as jurors to take the law of the case from the Court. You are the sole and exclusive judges of the facts. You are admonished not to
 127 permit your judgment, your reason or your intelligence to be swayed by prejudice, by bias, or illwill. You are not to be influenced by your feelings or your emotions. Your verdict must be rendered in accordance with the solemn oath you took that you would well and truly try the case and a true verdict render in accordance with the law and in accordance with the evidence. Consider the matter carefully and deliberately in the light of the instructions on the law which I have given to you. In reaching your conclusion, you must use the same common sense, the same approach, the same intelligence, which you would employ in determining any important matter that you have to decide in the course of your own affairs.

It is necessary for all twelve of you to agree upon your verdict. The indictment is drawn in two counts. You must make a separate finding upon each count of the indictment. With reference to the first count, since this indictment charges robbery, and robbery armed with a pistol, you may find the defendant upon the first count either not guilty, guilty of robbery, or guilty of armed robbery. In short, there are three possible verdicts you may find on the first count of the indictment,—not guilty, guilty of robbery, or

guilty of armed robbery. Upon the second count of the indictment, you may find the defendant either not guilty, or guilty.

128 Will counsel approach the Bench?

(Thereupon, Counsel and the Reporter approached the Bench and, out of the hearing of the jury, the following proceedings were had:)

The Court: Does the Government request any further charge?

Mr. Smithson: The Government has no further charge to request.

The Court: Are there any exceptions to the charge as given?

Mr. Smithson: No exceptions.

The Court: Does the defendant request any further charge?

Mr. Ahern: No, Your Honor.

The Court: Are there any exceptions to the charge?

Mr. Ahern: None whatever.

The Court: Very well.

• * • • • • • • • • •

137 He testified that then he proceeded to No. 6 precinct, where he was seated at a table when the defendant, Osborne, was questioned,—when the witness, Osborne, was questioned. He heard the man involve the defendant, Wagstaff, in this crime. He heard the man admit he took part in it. He states the defendant, Wagstaff, said nothing, or that he wanted to see a lawyer.

• * • • • • • • • • •

140 I think Wagstaff by his leadership embroiled this
141 boy in this. I really believe that this boy was embroiled in this by this defendant, Wagstaff.

Now, Wagstaff, as you have heard, made no statement relative to what the man Osborne in No. 6 precinct stated, other than the fact that he stated to Officer Smith, in response to where the gun was: "You don't expect me to

tell you where the gun is. After all, I am a three-time loser." Now, the only other statement he made, according to the officer, was "I want to see a lawyer." That is all.

* * * * *

155

Extract of Proceedings

Mr. Laughlin: Now, Your Honor, if we may vary the proceeding here somewhat, to save the time of a physician, may I now, or, if you are going to take a short recess, after that, put a doctor on the stand for another point in this case that we want to preserve?

The Court: What is the nature of the testimony?

Mr. Laughlin: Psychiatric testimony.

The Court: The Court will not take psychiatric testimony at this stage of this case. Was there any motion for psychiatric examination? What is your point?

Mr. Laughlin: Well, we want to show, Your Honor, that at the time this offense was committed, this man was of unsound mind, and that, therefore, he could not distinguish between right and wrong.

The Court: That is a defense that should have been pleaded at the trial of the case, Mr. Laughlin.

Mr. Laughlin: I agree with Your Honor. There isn't any question about that. But if it wasn't, I think Your Honor has the right now to hear that and to determine after hearing it whether it is the type of testimony that could possibly have had an effect on the jury. I agree with you that it should have been done at the trial, but it wasn't. Now we are prepared to offer it.

The Court: In order to preserve your status on
156 the record, the Court will decline to hear testimony of this kind, on the grounds that if it is a matter of defense, it should have been pleaded at the trial of the case.

Mr. Laughlin: Do you suppose we could do this, Your Honor, so the record will be fully preserved? May the record show that Doctor Michael Miller, a physician, also a psychiatrist, is personally present? I received word that

he is outside. Had he been permitted to testify, he would testify he examined the defendant on at least two occasions—

The Court: When?

Mr. Laughlin: Yesterday, and the day before; that he reviewed his whole background, and it was his testimony that he suffered from a mental disturbance,—

The Court: It would be his testimony.

Mr. Laughlin: It would be his testimony—to such an extent that at the time of the commission of this offense in September, 1951, he was not able to distinguish right from wrong, and, therefore, was of unsound mind at that particular time.

I will have Mr. Ahern excuse him, then, Your Honor. Do you want me to continue, or take a short recess?

The Court: Continue.

• • • • •

BRIEF FOR APPELLANT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

For the

JANUARY TERM, 1952

District of Columbia Circuit

FILED MAY 28 1952

No. 11,366

Joseph W. Stewart
CLERK

JOSEPH A. WAGSTAFF, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the
District of Columbia

JAMES J. LAUGHLIN,
ALBERT J. AHERN, JR.,
National Press Building,
Washington, D. C.
Counsel for Appellant.

QUESTIONS PRESENTED

1. Was not appellant denied a fair and impartial trial, and were not his constitutional rights violated when a policeman testified to an alleged statement of appellant that "I am a three-time loser", which put before the jury evidence of appellant's prior criminal record when appellant did not choose to take the witness stand?
2. Did not the trial judge commit reversible error when it instructed the jury on the principles of admission by silence when the record conclusively shows that appellant was under arrest at the time the statements were made?
3. Did not the trial judge commit reversible error when he admitted in evidence a gun, as Government Exhibit 1, when the record clearly shows that the complaining witness did not identify the gun as the weapon held by appellant and the gun introduced in evidence was in fact taken from the accomplice, Osborne?
4. Was it not incumbent upon the trial judge to grant a directed verdict as to both counts of the indictment when there was no evidence in the record to connect appellant with the gun which was admitted in evidence as Government Exhibit 1?
5. Did not the trial judge commit reversible error in instructing the jury on the question of accomplice testimony and its relationship to appellant?
6. Was not the trial court without jurisdiction to pass on appellant's motion for a new trial when the record shows that appellant was prepared to show by psychiatric testimony that he was of unsound mind at the time of his trial and also at the time of hearing on the motion for new trial; and did not the trial judge commit an abuse of discretion in refusing to allow appellant to present psychiatric testimony at the motion for new trial?

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANUARY TERM, 1952

No. 11,366

JOSEPH A. WAGSTAFF, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the
District of Columbia

BRIEF ON BEHALF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction in the court below. Appellant was convicted under a two count indictment charging violations of Title 22, Sec. 3202, commonly known as committing a crime when armed; and Title 22, Sec. 3204, commonly known as carrying a concealed weapon. On January 15, 1952 he was sentenced to serve a period of 7 to 21 years in the penitentiary.

This Court has jurisdiction to review the conviction inasmuch as it is a final order of the United States District Court for the District of Columbia subject to appellate review.

STATUTES INVOLVED

Title 22, Sec. 3202, D. C. Code:

“If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm, he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than five years; upon a second conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than ten years; upon a third conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than fifteen years; upon a fourth or subsequent conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for an additional period of not more than thirty years.”

Title 22, Sec. 3204, D. C. Code:

“No person shall within the District of Columbia carry concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon.”

STATEMENT OF THE CASE

Appellant was tried and convicted under an indictment containing two counts. The first count charged violation of Title 22, Sec. 3202, D. C. Code, commonly known as armed robbery. The second count charged a violation of Title 22,

Sec. 3204, D. C. Code, commonly known as carrying a concealed weapon. The Government contended that appellant and one Richard Howard Osborne were in a taxicab driven by George Ralph Murray on the night of September 25, 1951. Murray identified appellant as the individual who held a gun at his back and told him to turn over his money (JA 8). Murray testified further that he turned over \$10.60 to appellant (JA 7). Richard Howard Osborne was apprehended and pleaded guilty to the robbery of September 25, 1951. Osborne filed a written statement (Defendant's Exhibit 1) which outlined in detail the events of September 25, 1951, and in the statement he said his accomplice was named "Joe" (JA 20). Nowhere in the statement of Osborne, received in evidence as Defendant's Exhibit 1, does the name of appellant appear (JA 20). Osborne was called as a witness and testified that appellant was not the individual with him on the night of September 25, 1951 (JA 35). Osborne denied ever identifying appellant at police headquarters or elsewhere as the man who accompanied him and aided him in the robbery of September 25, 1951.

The Government called to the witness stand one Douglas M. Smith, a policeman who had apprehended appellant. When Officer Smith was questioned as to the conversation he had with appellant, he testified that appellant said "Hell, no. I am not going to tell you. After all, I am a three-time loser" (JA 31). Later the trial judge expressed concern over the remark of the witness Smith for fear that it put in evidence the prior criminal record of appellant (JA 40). The witness Smith repeated the remark "I am a three-time loser" (JA 31). In arguing to the jury, Government counsel stated that Wagstaff had planned and engineered the robbery of September 25, 1951 and repeated to the jury the remark of Officer Smith that appellant was a "three-time loser" (JA).

The Government called one Rufus T. Nash, a policeman, who testified that he questioned the confessed robber Os-

borne in the presence of appellant (JA 13, 17). Nash testified that Osborne had stated in the presence of appellant that appellant was his accomplice and that appellant had given him the gun used on the night of September 25th (JA 17). The officer testified that while Osborne was being questioned in the presence of appellant, all appellant stated was that he wanted to see his lawyer (JA 10, 38, 39). Appellant's counsel objected to all statements made by Osborne in the presence of appellant, but these objections were overruled by the trial judge (JA 14).

When Osborne was apprehended he possessed \$10.60 (Def. Ex. No. 1). Appellant's counsel moved for a judgment of acquittal but was overruled by the trial judge. The case was submitted to the jury and they returned a verdict of guilty as charged on both counts of the indictment.

STATEMENT OF POINTS

1. Viewing the record in its entirety, appellant suffered prejudicial and reversible error when a policeman testified to an alleged admission of appellant that he was "a three-time loser".

2. The trial judge committed reversible error within this Court's ruling in *Shisowski v. U. S.*, 81 App. D. C. 274, when it admitted in evidence, over appellant's objections, statements by the witness Osborne made in the presence of appellant while appellant was under arrest, and then instructed the jury on the principle of admissions by silence.

3. The trial judge committed reversible error in receiving in evidence Government Exhibit 1, which was the gun allegedly used by appellant on the night of September 25, 1951, but the record shows that the complaining witness did not identify the gun as the gun that was held by appellant during the course of the robbery.

4. The trial judge committed reversible error in refusing to direct a judgment of acquittal as to both counts of the

indictment when the record clearly shows that the complaining witness did not identify Government's Exhibit 1 as the gun that was used in the alleged robbery of September 25, 1951.

5. The trial judge committed prejudicial error within the meaning of the Supreme Court's ruling in the case of *Bolenbach v. U. S.*, 326 U. S. 607, when it failed to adequately and correctly instruct the jury on the principle of accomplice testimony and the relationship of the witness Osborne to appellant.

6. The trial court committed reversible error within the meaning of *Johnson v. Zerbst*, 304 U. S. 458, when it purported to rule on appellant's motion for a new trial when appellant alleged that he was prepared to show by psychiatric testimony that the Court lacked jurisdiction to pass on the motion because appellant was not only of unsound mind at the time of the offense, but was of unsound mind at the time the motion for new trial was being heard.

SUMMARY OF ARGUMENT

1. The trial judge committed reversible error and appellant was denied a fair trial when the witness Smith testified that appellant allegedly stated "Hell, no. I am not going to tell you. After all, I am a three-time loser", and the trial judge did not on its own motion declare a mistrial and did not by appropriate instructions cure the prejudice that resulted from this remark.

2. The trial judge committed reversible error when it instructed the jury on the question of admissions by silence when the record clearly shows that within this Court ruling in *Shiskowski v. U. S.*, *supra*, a defendant is under no duty to speak while under arrest.

3. The trial judge committed reversible error when he admitted in evidence a gun as Government Exhibit 1, when the record shows that when appellant was apprehended he

did not poss a gun, and the complaining witness did not testify the gun introduced in evidence as the gun allegedly held by appellant during the course of the robbery.

4. The trial court committed reversible error when it failed to grant appellant's motion for judgment of acquittal when the record shows that when appellant was apprehended he did not possess a gun, and the complaining witness, the only witness to identify appellant, did not testify that Government Exhibit 1 was the gun held by appellant during the course of the robbery.

5. The trial judge committed reversible error within the meaning of the Supreme Court's ruling in *Bolenbach v. U. S.*, *supra*, when it did not adequately instruct the jury on the question of accomplice testimony and specifically did not adequately instruct the jury on the relationship of Osborne to appellant.

6. The trial judge committed reversible error when he purported to rule on appellant's motion for new trial when appellant sought to show that the trial court was without jurisdiction because appellant was at the time of the hearing of unsound mind; and the trial judge committed an abuse of discretion in refusing to allow appellant's counsel to show by psychiatric testimony that the trial court was without jurisdiction to try appellant for appellant was of unsound mind at the time of his trial.

ARGUMENT

1. Appellant was denied a fair trial and in fact his prior criminal record was introduced in evidence when a police officer testified to an alleged admission of appellant that "I am a three-time loser".

During the course of the trial the Government called to the stand one Officer Smith, who testified to certain conversations he had with appellant. During the course of examination, the record reflects the following (JA 31):

"Q. You had no further conversation with Wagstaff other than what you have related, which took place in the car; is that right?

A. Well I had the conversation of asking him about the gun, about locating the gun.

* * * * *

Q. Where was that, in No. 6?

A. Yes, sir.

Q. What did you say?

A. I asked him if he had a gun, or if he would tell us where the gun was, and he stated, 'Hell, no. I am not going to tell you. After all, I am a three-time loser'.

Appellant respectfully points out to the Court that a most detailed examination of Officer Smith on direct examination by the District Attorney revealed no such conversation as that testified to above (JA 29, 30). This fact alone corroborates appellant's contention that the statement of the officer was perjurious, that the conversation never occurred, and it was a direct attempt on the part of the officer to prejudice appellant's defense and to put before the jury the fact that appellant had a previous criminal record. Appellant chose to assert his constitutional right to refuse to take the witness stand, but the statement of the officer in fact put his criminal record before the jury just as graphically and realistically as the District Attorney would have done if appellant had taken the witness stand and subjected himself to examination on this point. Appellant suggests further that the witness repeated the remark (JA 31) and that the District Attorney, in arguing the case to the jury, emphasized the alleged confession of Officer Smith that appellant was a "three-time loser". The record reflects the District Attorney stated in his closing argument the following:

"Now, Wagstaff, as you have heard, made no statement relative to what the man Osborne in No. 6 Precinct stated, other than the fact that he stated to Officer Smith, in response to where the gun was: 'You don't

expect me to tell you where the gun is. After all, I am a three-time loser'. Now, the only other statement he made, according to the officer, was 'I want to see a lawyer'. That is all."

Appellant respectfully states that the admission of this testimony was of such a prejudicial nature that it was incumbent upon the trial judge to adopt one of two courses. The trial judge should have declared a mistrial on his own motion; or, he should have instructed the jury by full and proper instructions to disregard the statement related by Officer Smith and to give it no consideration in determining the merits of the case on trial. The trial judge recognized the serious nature of this testimony and the prejudicial effect it would have upon the jury, and this is reflected in the record as follows (JA 40):

"THE COURT: There is one further evidentiary element the court has given some thought to, and that is the testimony of the officer, who said that the defendant stated that he was a three-time loser.

MR. SMITHSON: Officer Smith, Your Honor.

THE COURT: Officer Smith.

MR. AHERN: I am worried about that.

THE COURT: Which raises the question of criminal record. The matter of criminal record is something in reference to which the generally accepted charge of the court is that if the defendant takes the stand, and so on. The court will attempt to charge in effect that the guilt or innocence of this defendant must be determined by the evidence in this case, and in this case alone."

Appellant also states that a study of the instructions of the trial judge reveals that he did not in any way attempt to cure the prejudicial effect which this statement had upon the jury. Appellant now respectfully calls the Court's attention to a case precisely in point with the facts of the instant case, in which the Court stated that the prejudice which affected the defendant demanded that the Court award a new trial. Appellant calls the court's attention to

the case of *Commonwealth of Pa. v. Kornafel*, 22 Lehigh Cty. Law Journal 45. Here the defendant was convicted on two counts, count 1, operating a vehicle while under the influence of liquor, and count 2, of beating an officer while attempting to make an arrest. During the course of the trial the Commonwealth called as a witness a police officer. The following testimony appears in the record:

“Q. Did you observe how the defendant Michael acted when he was there (in the police room)?

A. He was sitting on one of the seats in the courtroom, pleading with Officer Good for a ‘break’.

Q. What was he saying?

A. He wanted a break—he said he was in trouble before and did not want to go back to jail.”

The court, in discussing the prejudicial nature of this alleged admission, stated:

“We are convinced that there was error in permitting this evidence to go to the jury * * *. The probative value of the statement here challenged, if any, in permitting the jury to determine that it was an admission or expression indicating a guilty knowledge; *Commonwealth v. Coles*, 265 Pa. 362; *Commonwealth v. Williams*, 307 Pa. 134, is far outweighed by the harm done the defendant by permitting prejudice respecting other presumed criminal violation to creep into this case. The statement of the defendant is subject to a variety of interpretations, some of them consistent with innocence, others with guilt; the latter position, however, respecting prior trouble and imprisonment being subject to only one inference, i.e.—that defendant has been arrested, convicted and imprisoned for a prior unknown crime or a variety of them.

An admission, as such, has been defined as a statement by the defendant of a fact or facts pertinent to the issues and tending, in connection with proof of other facts or circumstances, to prove the guilt of the defendant * * *. These cases, however, relate to admissions respecting the offense under consideration at the moment and not to others.”

The Court then concluded with the following language and declared that the admission of this testimony necessitated a new trial. The court stated:

"We are then impelled and obliged to revert to the rule that evidence respecting the commission of other crimes, whether by direct proof on the part of the prosecution * * * or presented by it as admissions made by defendant (*Commonwealth v. Wilson*, 186 Pa. 1; *Commonwealth v. Rocco*, 225 Pa. 113) is inadmissible in evidence. The primary test seems to be the connection of the facts or admissions offered with the subject charged. *Commonwealth v. Shanor*, 29 Pa. Super Ct. 358, and *Commonwealth v. Lipschultz*, 89 Pa. Super. Ct. 112. Here there is no connection in time, nature, design, purpose or plan, and the inference to be derived would be purely prejudicial and the burden upon the defendant would be beyond every contemplation of our vaunted trial system."

Appellant also calls the court's attention to the case of *Commonwealth v. Jones*, 1 Lebanon City, Legal Journal 233, which announced the principle that the admission of testimony purporting to be the conversation of a defendant which relates to other offenses is inadmissible and is reversible error. In that case defendant was indicted and convicted of burglary and larceny. Defendant objected to certain admissions testified to by a police officer. The conversation objected to was as follows:

"When the chief of police was called and asked to give his conversation with the defendant concerning the crime for which he was indicted, the District Attorney, offered to show the entire conversation and contended that the whole was admissible although in it the defendant had admitted the commission of other crimes."

The conversation went as follows:

"I started off, I said well I suppose you know what we got you here for and he said yes. He said this is one time I didn't do it. He said you know every time

I have been in trouble I pleaded guilty. I said 'No, you didn't plead guilty to all of them'. He said 'Yes, I did'. I said 'No you didn't' and I made mention then of a case of a store being broken into and he worked there, and I said you don't suppose you told the truth on that and he said 'Yes I did' and I said how about Saugenhaups and he said I didn't do this."

The court, in discussing the prejudicial nature in the admission of this alleged conversation with the defendant, which admitted the commission of other crimes and put in evidence his prior criminal record, stated:

"This statement was not a confession or admission of the perpetration of the offense with which defendant is charged * * *. In view of this conclusion the defendant as to other crimes committed by defendant made by him to the chief of police, was improperly admitted and the defendant is entitled to a new trial."

Appellant also calls the court's attention to the case of *People v. Spencer*, 106 N. E. 225, in which the court stated:

"The general rule is that a statement in the nature of an admission or confession, in order to be admissible, must relate to the offense in question." Citing *Commonwealth v. Kosier*, 182 N. E. (2d) 852. *State v. Knox*, 18 N. W. (2d) 716. *People v. Brown*, 163 Pac. (2d) 85.

Appellant states to the court that the admission of the testimony by Officer Smith that appellant was a three-time loser should prompt this court to reverse, even if the trial judge had meticulously instructed the jury to disregard any testimony they may have heard in relation to other offenses that might have been committed by appellant. However, in the instant case, although the trial judge expressed concern over the admission of the testimony, a study of the instructions reveals that the jury was not instructed in any manner as to the alleged admissions of appellant that he was a three-time loser. Appellant calls

this court's attention to the case of *People v. Robinson*, 273 N. Y. 438, in which the court discusses the effect of prejudicial testimony upon a jury. The court stated:

"We have said recently: 'We must give to any defendant the right to be tried for the crime with which he is charged, and upon evidence proving or tending to prove that crime, uninfluenced by irrelevant facts and circumstances which tend to prejudice or mislead the jury. Issues must be left clear, not smothered or in a haze'."

As the Supreme Court stated in *Derry v. Cray*, 5 Wall. 795:

"We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. *But whenever the application of this rule is sought it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.*"

While we realize that there was no objection made to the admission of the testimony above, we believe it comes within the ruling of this court in *Williams v. U. S.*, 76 App. D. C. 299, in which this Court stated:

"It is our custom, however, in cases of serious criminal offenses to check carefully the record for error prejudicial to the defendant which he did not urge." Citing *Gomilo v. U. S.*, 146 F. (2d) 372, *McAffee v. U. S.*, 70 App. D. C. 142. *Lamento v. U. S.*, 4 F.(2d) 901. *Catoe v U. S.*, 76 App. D. C. 292.

We therefore state that the admission of this testimony fell within the reasoning of the Supreme Court's language in *Quercia v. U. S.*, 289 U. S. 466; 53 S. Ct. 698, in which the Supreme Court held that the trial judge had not adequately cured the prejudicial effect of certain remarks in the presence of the jury. The Supreme Court stated:

"His characterization of the manner and testimony of the accused was of a sort most likely to remain

firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." Citing *Wallace v. U. S.*, 291 Fed. 972. *Leslie v. U. S.*, 43 F(2d) 288.

As stated in *Giles v. U. S.*, 144 F(2d) 860:

"The Circuit Court of Appeals will examine the record with reference to an assigned claim of error to which no objection has been made or exception taken in the District Court far enough to see that there is no miscarriage of justice." Citing *U. S. v. Kadison*, 145 F(2d) 525. *Miller v. U. S.*, 120 F(2d) 968.

We earnestly contend that the statement of Officer Smith that appellant was a three-time loser had a lasting and prejudicial effect upon the jury; that the trial judge did not cure the defect; and that this Court, in light of the Williams case above, will notice prejudicial error even when objection is not made at the trial.

2. The trial court committed reversible error in instructing the jury on the principle of admissions by silence.

At R. 124 and 125 the trial judge instructed the jury in detail as to the principle of admissions by silence. Specifically the trial judge instructed the jury that the confessed accomplice, Osborne, had made certain statements in the presence of appellant and appellant had not denied or made a response to these accusations. The trial judge then went into detail on the law regarding the effect of such silence. Appellant now suggests to this Court that the instructions of the trial judge violated the Supreme Court's ruling in the case of *Bolenbach v. U. S.*, 326 U. S. 607, for a study of the authorities and the ruling of this Court in *Skiskowski v. U. S. supra*, clearly establishes the principle that an accused, while under arrest, is under no duty to speak or reply to accusatory statements made in his presence. The record shows at JA (13, 14) that certain police officers testified that the confessed robber Osborne identified appel-

lant as his accomplice and that appellant made no denial or response to the statements of Osborne. It is to be noted, however, that on the witness stand Osborne denied any such statements and in fact denied that appellant was his accomplice. In any event the statements of the officers as to the identification of appellant by Osborne served as the basis for the trial judge's instructions on the principles of admissions by silence.

The classic case of *Yep v. U. S.*, 83 F(2d) 841 announced:

"When one is under arrest or is in custody, charged with crime, he is under no duty to make any statement concerning the crime with which he stands charged; and statements tending to implicate him, made in his presence and hearing by others, when he is under arrest or in custody, though not denied by him, are not admissible against him."

All of the statements made by Osborne in the presence of appellant were made while appellant was under arrest. In *U. S. v. LoBiondo*, 135 F(2d) 130, the court approved the ruling of *Yep v. U. S.*, *supra*, that a defendant is under no duty to speak when under arrest, and approved the language in *McCarthy v. U. S.*, (6th Circuit), 25 F(2d) 298, wherein the court stated:

"To draw a derogatory inference from mere silence is to compel the respondent to testify; and the customary formula of warning should be changed, and the respondent should be told 'If you say anything it will be used against you; if you do not say anything that will be used against you'."

It is also stated by Judge Hand, in *DiCarlo v. U. S.*, 6 F(2d) 364:

"It is a common error to suppose that everything said in the presence of a defendant is ipso facto admissible against him. While the question is a delicate one, depending largely upon the discretion of the trial judge, nevertheless more must appear than that the defendant heard the statement. We think that the evidence

of how the defendants met Patiturci's accusation in the police station was plainly not enough to admit the identification as admissions."

It is therefore clearly shown from the record that the instructions of the trial judge on the question of admissions by silence were erroneous and improper. Appellant was under arrest at the time Osborne made the statements in his presence, and appellant, under authorities cited above, was under no duty to speak or respond to these accusations.

Appellant also calls the court's attention to the fact that the remarks made in appellant's presence were not directed to him. When the witness Osborne was interrogated as to whether appellant was his accomplice, appellant made no response, but it is to be noted that the remark of the officer was directed to Osborne and not to appellant. We feel that this court's latest expression on this question was in the *Skiskowski* case, in which Judge Clark stated that there was grave doubt as to whether the question of admission by silence has any application to a defendant when he is in custody. Appellant was in custody; he was under no duty to speak; the instructions of the trial judge relating to this were inappropriate; they prejudiced the rights of appellant; and it now becomes the duty of this court to reverse.

Appellant also addresses the court's attention to the fact that assuming the trial judge was correct in instructing the jury on the questions of admission by silence, his instructions were incomplete and equivocal in that the trial judge did not instruct the jury that the only purpose for receiving testimony as to appellant's silence was to show appellant's conduct when faced with certain accusations. The jury should have been definitively instructed that they were not to consider the truth or falsity of the accusation but they were merely to consider the conduct of the accused when accusatory statements were made in his presence. The jury should have been instructed with the principles laid

down in *People v. Zoffel*, 95 Pac. (2d) 160, in which the court stated:

“When an out of court accusation is made, it is not the accusation, but the conduct of the accused that is evidence, and the accusation is merely admitted to explain the conduct of the accused.” See *People v. Cacippo*, 93 Pac. (2d) 164. *White v. Commonwealth*, 166 S. W. (2d) 373. *State v. Bowdry*, 145 S. W. (2d) 127. *People v. Luft*, 18 N. Y. S. (2d) 880. *State v. Redwine*, 161 Pac. (2d) 205.

In view of the authorities above it thus appears that the trial judge committed two serious errors: (1) He should not have instructed the jury on the question of admission by silence; and (2) even assuming, contrary to the record, that appellant was not under arrest and that admissions by silence would therefore be proper, it was incumbent upon the trial judge to instruct the jury that the sole purpose of receiving such testimony was to show not the truth of the accusatory statements but to show the conduct of the accused. Therefore, in view of all the authorities above, it was clear and reversible error, and it now becomes the duty of this court to reverse the judgment of the lower court.

3 and 4. The trial judge committed reversible error when he admitted in evidence a gun and failed to grant appellant's motion for a judgment of acquittal on the two counts named in the indictment.

Appellant was charged with armed robbery but when apprehended he did not possess a gun. The Government, over appellant's objection, introduced in evidence a gun (Government Exhibit 1), which purported to be the gun which was used on the night of the robbery. The gun was not identified by the complaining witness as the gun appellant was alleged to have pointed at him, and the witness Osborne denied that appellant was with him on the night in question. When Government counsel was examining

police officer Rufus T. Nash, the record reflects the following (JA 25, 26):

"Q. Did you search the defendant Osborne or was he searched in your presence?

A. No, I didn't search him. I don't believe he was, in my presence. I frisked him at the time of his arrest.

MR. SMITHSON: I would like to offer in evidence, if Your Honor please, Government Exhibit No. 1, consisting of a .45 Colt automatic.

MR. AHERN: I will object to it, if Your Honor please."

The court overruled appellant's objection, and the gun was admitted in evidence. Appellant calls attention to the fact that he was indicted under Title 22, Sec. 3202. It was incumbent upon the Government to show that appellant committed an armed robbery and the indictment charged that it was committed with a gun. At the time the court admitted in evidence the .45 Colt automatic, it had not been identified by the complaining witness Murray as the gun appellant was alleged to have possessed on the night of the robbery, and it was not identified by the witness Osborne, who had pleaded guilty to the offense. Therefore it is clear there was no basis upon which the trial judge admitted Government Exhibit No. 1. The prejudice resulting from the admission of this exhibit is readily seen, for the jury was led to believe that Government Exhibit 1 was in fact the gun that was used on the night of September 25th. There is not a shred of testimony in the record to show that in fact Government Exhibit 1 was the gun that was used on the night of the robbery.

Appellant therefore says the trial judge committed reversible error when he failed to grant his motion for judgment of acquittal as to both counts of the indictment, for the Government had not proved beyond a reasonable doubt that appellant had used a gun on the night of the robbery and there was no evidence to support a conviction under Title 22, Sec. 3204, for they did not show by competent

testimony that appellant was in possession of Government Exhibit 1. Appellant states that the admission of Government Exhibit 1 constituted prejudicial error. The exhibit was improperly received and the jury was led to believe that Government Exhibit 1 was in fact the actual gun that was used on the night of the robbery. This had a great effect and tendency to cause the jury to find appellant guilty as charged, whereas if the gun had not been admitted in evidence it may well have been that the jury would have found appellant not guilty of armed robbery.

We think the conviction in the instant case rested largely on the testimony of the complaining witness Murray and the testimony of certain police officers. In view of the fact that the complaining witness Murray was the only witness who allegedly saw appellant in the possession of a gun, we believe it was incumbent upon the Government to prove beyond a reasonable doubt that the gun which was admitted in evidence was the gun Murray had seen on the night in question. The Government failed to do this and hence it was the duty of the trial judge to withdraw from the jury's consideration the question of whether appellant could be found guilty of armed robbery. The failure of the trial judge to do so constituted reversible error and it becomes the duty of this Court to correct the judgment of the lower court.

5. The trial judge committed reversible error within the meaning of the Supreme Court's ruling in the case of *Bolenbach v. U. S.*, 326 U. S. 607, when he failed to adequately instruct the jury on the question of accomplice testimony and its relationship to appellant.

A study of the record reveals that the trial judge gave a very misleading instruction on the question of accomplice testimony and its relationship to appellant. Specifically the trial judge stated:

"It is a question of fact for you to determine whether the defendants Wagstaff and Osborne are

accomplices. If you find in your deliberation and upon the basis of the evidence before you that Wagstaff and Osborne are accomplices, you are, of course entitled to consider the testimony of Osborne as being the testimony of an accomplice to this defendant."

The misleading nature of this instruction is immediately apparent. Osborne had pleaded guilty to the robbery for which appellant was on trial. Thus Osborne was an accomplice as a matter of law of whomever was with him on the night of the robbery. The trial judge should have instructed the jury that Osborne was an accomplice as a matter of law and it was for them to determine whether appellant was with Osborne, and they must be satisfied beyond a reasonable doubt that appellant was with Osborne on the night in question. The effect of the trial judge's instruction was to place Osborne and appellant on the same parity, that is, the trial judge's instruction gives the impression that the jury could find that Osborne was not an accomplice. The Supreme Court has stated in the *Bolenbach* case that a criminal conviction cannot rest upon an equivocal instruction on a basic issue. We feel that the instruction above has the obvious effect of throwing appellant in the same category with Osborne, and since the jury was aware that Osborne had pleaded guilty the instruction of the trial judge that it was up to them to determine whether Osborne and appellant were accomplices thrust a confused factor into the jury's mind, for it is apparent that the proper instruction for the trial judge to have given was to have stated (1) that Osborne was an accomplice as a matter of law, and (2) before they could find appellant guilty they must find beyond a reasonable doubt that he was the individual who was with Osborne on the night of the robbery. In view of the misleading and prejudicial nature of the trial judge's instruction, it becomes the duty of this Court to reverse the judgment of the lower court.

6. The trial judge committed reversible error within the meaning of *Johnson v. Zerbst*, 304 U.S. 458, when he pur-

ported to rule on appellant's motion for new trial; and the trial judge committed an abuse of discretion when he refused appellant's counsel the right to introduce psychiatric testimony at the motion for new trial.

Appellant's counsel sought to show at the motion for new trial that appellant was of unsound mind at the time the motion for new trial was being heard. The record reflects (JA 48, 49) that appellant intended to introduce psychiatric testimony to the effect that appellant was of unsound mind at the time of the trial and at the time of the motion for new trial. The record shows the following:

MR. LAUGHLIN: Now, Your Honor, if we may vary the proceeding here somewhat, to save the time of a physician, may I now, if you are going to take a short recess, after that, put a doctor on the stand for another point in this case that we want to preserve?

THE COURT: What is the nature of the testimony?

MR. LAUGHLIN: Psychiatric testimony.

THE COURT: The Court will not take psychiatric testimony at this stage of this case. Was there any motion for psychiatric examination? What is your point?

MR. LAUGHLIN: Well, we want to show, Your Honor, that at the time this offense was committed, this man was of unsound mind, and that, therefore, he could not distinguish between right and wrong.

THE COURT: That is a defense that should have been plead at the trial of the case, Mr. Laughlin.

MR. LAUGHLIN: I agree with Your Honor. There isn't any question about that. But if it wasn't, I think Your Honor has the right now to hear that and to determine after hearing it whether it is the type of testimony that could possibly have had an effect on the jury. I agree with you that it should have been done at the trial, but it wasn't. Now we are prepared to offer it.

THE COURT: In order to preserve your status on the record, the Court will decline to hear testimony of this kind, on the grounds that if it is a matter of defense, it should have been pleaded at the trial of the case."

We submit that the trial court could not rule on the motion for new trial because appellant was of unsound mind at the time; and we submit further that this case is distinguishable from this Court's ruling in *Bundy v. U. S.* (No. 10,825), in that the trial judge should have allowed psychiatric testimony to be heard at the motion for new trial to determine in fact whether the court originally had jurisdiction to try appellant and to impose sentence upon him. The trial judge was of the view that insanity should have been pleaded at the time of trial. While we agree that this would have been the better practice, the fact remains that when appellant's counsel ascertained that appellant was of unsound mind and that he could not even intelligently discuss the facts relating to his case, it was incumbent upon the trial judge to hear such testimony.

Appellant suggests to this Court that in accordance with Title 24, Sec. 301, 302 and 303, it was incumbent upon the trial judge to hear testimony and if necessary to commit appellant for hospitalization in accordance with the provisions of those statutes. Appellant states therefore that if the trial judge had allowed the psychiatric testimony to be presented it would have been shown that appellant was of unsound mind at the time of the offense and of unsound mind at the time the motion for new trial was being heard. Thus within the meaning of *Johnson v. Zerbst, supra*, the trial court had no jurisdiction to try appellant for the offense or to rule upon his motion for new trial. It was incumbent upon the trial judge to hear testimony and to act in accordance with Title 24, Sec. 301, 302 and 303. Appellant states further that while this Court has announced it is within a trial court's discretion to hear testimony on a motion for new trial, this rule does not apply when appellant seeks to show that in fact the trial court lacks jurisdiction to punish appellant when appellant is of unsound mind. We feel the trial judge should have allowed the testimony to be heard and that his failure to do so constituted a flagrant abuse of discretion, and it becomes the

duty of this Court to reverse the judgment of the lower court and to act in accordance with Title 24, Sec. 301, 302 and 303.

CONCLUSION

In view of the serious questions of law involved and despite the fact that the prosecuting attorney might suggest to this Court that proper objections were not made below, we feel it becomes the duty of this Court, within the meaning of the *Williams* case, *supra*, to see that substantial justice is done and reverse the judgment of the lower court.

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Certificate of Service

I certify that I have this day mailed copy of this brief for appellant to the office of Charles M. Irelan, Esq., United States Attorney, Court House, Washington, D. C.

(S) JAMES J. LAUGHLIN

This the 28th day of May, 1952.

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11366

JOSEPH A. WAGSTAFF, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

CHARLES M. IRELAN,
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United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN 20 1952

Joseph B. Stewart
CLERK

QUESTIONS PRESENTED

George Murray, a cab-driver, was robbed at gun-point by one Osborne and a man Osborne named as "Joe." Joseph Wagstaff appeals from a judgment entered on a jury's finding that he was the guilty party. In the appellee's opinion the questions are:

1. Whether Wagstaff has standing on appeal to complain of testimony elicited by his own counsel to the effect that he was a "three-time loser," or further, whether in view of the overwhelming evidence of guilt the incident requires reversal of the judgment.

2. Whether statements made by Osborne in the presence and hearing of Wagstaff after their arrest, and the conduct of Wagstaff when confronted with the accusations contained therein, were properly admitted in evidence.

3. Whether the government's evidence of Wagstaff's participation in the robbery permitted (a) admission into evidence of a pistol said to have been used in the robbery and (b) submission of the question of Wagstaff's use of the pistol to the jury.

4. Whether the trial court's instruction relative to the accomplice testimony of Osborne tended to confuse or mislead the jury.

5. Whether it was an abuse of discretion for the trial judge, after Wagstaff's conviction, to reject a proffer of testimony by a psychiatrist that in his opinion Wagstaff was of unsound mind at the time of commission of the offense, when prior to trial Wagstaff had been examined by three psychiatrists and found of sound mind, and at trial no issue of sanity was raised by defense counsel.

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JOSEPH A. WAGSTAFF, APPELLANT

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UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A District Court jury found the appellant (hereafter referred to as Wagstaff) guilty of the crimes of armed robbery and carrying a pistol without a license. This is an appeal by Wagstaff from the judgment entered on the jury's verdict, imposing a sentence of six to twenty years imprisonment on the armed robbery conviction and one year on the pistol carrying conviction, those sentences to run consecutively (J. A. 4-5).

The evidence at trial may be summarized as follows. George Murray, a taxi driver, testified that he picked up Wagstaff and one Osborne at the corner of Thirteenth and G Streets NW., at about 1:15 a. m. on September 25, 1951. Wagstaff and Osborne asked to be taken to "Poor Joe's," a restaurant in the 4800 block of Georgia Avenue in northwest Washington (J. A. 5-6). Murray drove north on Thirteenth Street to Decatur Street. On Decatur Street, between Thirteenth Street and Georgia Avenue, Wagstaff commanded Murray, "Stop the cab"

(J. A. 6-7). When Murray failed to respond immediately, Wagstaff repeated his command, saying:

I said to stop this cab, if you don't want to get killed
(J. A. 7).

Murray heard a click and turned around to see Wagstaff with a gun. He stopped the cab and Wagstaff, holding the gun in Murray's face, demanded Murray's money. Murray gave him nine one-dollar bills and one dollar and sixty cents in change (J. A. 7-8). Wagstaff warned Murray that if he "didn't want to get shot" he was to "drive straight ahead, make no noise, and keep going." Wagstaff and Osborne then ran into an alley (J. A. 8). Murray immediately called his dispatcher on his two-way radio (J. A. 8).

Shortly thereafter in response to radio calls about the robbery, several police cruisers proceeded to the Georgia Avenue and Decatur Street area. Police Officer Jackson testified that he and Officer Young, while cruising in the area saw two men at the end of an alley (J. A. 27-28). Young got out of the car and approached the pair on foot. Jackson drove around in the cruiser to the end of the alley to close that path of escape. As Jackson drove into the alley he saw two men and jumped out of the cruiser in pursuit of them. He ordered the pair, whom he identified as Wagstaff and Osborne, to hold their hands up, and then started to search them (J. A. 28). After he had searched Wagstaff, looking for the gun, Wagstaff grabbed Jackson and shouted to Osborne, "Get the gun, Eddie." (J. A. 28). When Osborne did not respond, Wagstaff shouted again, "Eddie, get the gun. Let him have it." (J. A. 28). Jackson broke away and ducked behind a car. Wagstaff and Osborne then ran in different directions. Jackson and Young, who arrived on the scene as Jackson broke from Wagstaff's grasp fired several times at Wagstaff and Osborne as they fled (J. A. 28).

Officer Douglas M. Smith of No. 10 precinct testified that he and Officer Levandoski also responded to the radio call about the holdup (R. 69, 78). As they drove into Crittenden Street from Georgia Avenue, Smith saw a man (later identified as Wagstaff) crouched behind a parked automobile. Smith got

out of his own car and approached the man he had observed. As he did the man, with both hands raised in the air said "Here I am. I am your man" (J. A. 29-30). When Smith asked what he meant, the man replied, "I am Wagstaff" (J. A. 31). Wagstaff was taken to Georgia Avenue and Decatur Street where he was identified by Murray (the cab driver), and then to No. Six precinct for questioning (R. 71, 82).

Meanwhile Osborne, Wagstaff's companion, had been picked up in the alley by Officers Nash, Dalton, and Graves. He was taken to Georgia and Decatur (R. 29, 88) and identified (R. 28) and then taken to No. Six precinct. From information given by Osborne, Officer Nash recovered a gun from under a hedge in the vicinity of Osborne's arrest at Thirteenth and Crittenden Streets. That gun was marked by Nash at the time and later received in evidence at the trial as Government Exhibit No. 1 (J. A. 16, 26).

Officer Graves searched Osborne and found on his person nine one dollar bills and one dollar sixty cents in change—the same amount and description as the money taken from Murray. The money and the envelope in which Graves had put it were received at trial as Government Exhibit No. 2. (J. A. 33).

At No. Six precinct Osborne in the presence of Wagstaff, who remained silent, gave an account to the police about their robbery of Murray. Osborne identified Murray as the cab driver he and Wagstaff had robbed (R. 11-12). He stated that Wagstaff had the gun (J. A. 9), and gave it to him a short time after they had left the cab and started running (R. 37-38). Osborne identified Wagstaff as his partner in the crime (R. 61) and identified him as the man referred to as Joe (R. 56) in the following written statement Osborne gave the police:

About 2:00 PM Monday September 24, 1951, I left home and went to 10th & E Sts. N. W. by street car to pay a light bill. While at 10th & E Sts. N. W. I met another man who I did not know. He was standing on the side walk. We started talking. We talked of nothing in particular. He asked me if I wanted a beer. I said sure. He said lets go. We went to 6th & Mass. Ave N. W. There we drank several beers and we stayed

there until about dark. Then we went to some hotel and picked up his suitcase. While at the Hotel we intended to sleep some but the desk clerk would not let us stay. We left and went to a bar around the corner drank some more beer, one I think. We went out in the alley from the bar where he opened up his suitcase and got out a gun. He said "How do you like this." I said it's O K. He then locked up his suitcase and he put the gun under his belt. Then we were feeling pretty good so we got a cab and Joe told the cab driver to take us to poor Joe's place. When we got up this place he pulled the gun from under his belt and placed the gun beside the cab driver's head and said give me all your money. The cab driver gave it to him then he and I both got out of the cab and started running. When we got out of the cab he handed me the money and said put it in your pocket when we got about a half block away he gave me the gun and the Police were after us and he said take the gun and shoot the Police. I pulled the trigger once with the gun pointed at the ground but the gun didn't go off. I throwed the gun under a hedge and about that time the Police grabbed me. I was scared and somebody was shooting at me so that's why I run. I did not know joe was going to holdup anybody until we got near Poor Joe's. I never saw this boy Joe until this afternoon.

That statement was put in evidence by Wagstaff's trial counsel (J. A. 18. 24).

Lieutenant Thomas V. Slomanski testified that he had checked the records of the Metropolitan Police Department and that at no time had Wagstaff possessed a permit to carry a gun (J. A. 34).

Wagstaff did not testify. The sole evidence offered by Wagstaff was testimony by Osborne. On direct examination Osborne testified that on the morning of September 25 he had occasion to get into a taxicab with another person and that Wagstaff was not the person in the cab with him (J. A. 35). On cross-examination Osborne said that the man in the cab

with him had a moustache.¹ He admitted that he had pleaded guilty to the robbery and said that the signed statement he had given the police was true and correct except for the part in which he said that he had pulled the trigger on the gun (J. A. 35-36). He recalled seeing Wagstaff in No. Six precinct when he was there (R. 105).

Wagstaff's present counsel on appeal did not represent him at trial but entered the case after judgment had been entered.

APPLICABLE STATUTES AND RULES

D. C. Code 22-2901:

Robbery.—Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 810.)

D. C. Code 22-3202:

Committing crime when armed—Added punishment.—If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearms, he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than five years; * * *.

D. C. Code 22-3204:

Carrying concealed weapons.—No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon

¹ Although it had been shaved off by the time of trial, Wagstaff was wearing a moustache on the night of the robbery (R. 74).

capable of being so concealed: *Provided*, That arrests, without a warrant, and searches and seizures pursuant thereto, may be made for violation of this section, by police officers, as in the case of a felony, upon probable cause that the person arrested is violating this section at the time of the arrest; but no evidence discovered in the course of any arrest, search, or seizure authorized by this proviso shall be admissible in any criminal proceeding against the person arrested unless at the time of such arrest he was carrying a pistol or other dangerous weapon on or about his person. (As amended Nov. 4, 1943, 57 Stat. 586, ch. 296; Aug. 4, 1947, 61 Stat. 743, ch. 469.)

D. C. Code 22-3215:

Penalties.—Any violation of any provision of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than \$1,000 or imprisonment for not more than one year, or both. (July 8, 1932, 47 Stat. 654, ch. 465, § 15.)

Federal Rules of Criminal Procedure:

Rule 30

Instructions.—At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 33

New trial.—The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

Rule 52 (a)

Harmless error.—Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

SUMMARY OF ARGUMENT

Wagstaff is without standing to complain on appeal of the admission of his statement that he was a "three-time loser." In any event, in view of the overwhelming evidence of his guilt, the incident does not require reversal of the judgment of conviction.

The statements made by Osborne in the presence and hearing of Wagstaff after their arrest, and the conduct of Wagstaff when confronted with the accusations contained therein, were properly admitted in evidence. It follows, therefore, that the instruction of the trial court to the jury as to the consideration to be given such evidence was also proper.

The pistol found at the scene of Osborne's arrest was properly admitted in evidence against Wagstaff in view of the strong evidence that Wagstaff had been Osborne's Partner in robbing Murray and the man who held the pistol in Murray's face. It was likewise not error for the court to deny Wagstaff's motion for a judgment of acquittal.

The trial court's instruction to the jury relative to the accomplice testimony of Osborne was clear, unambiguous, and wholly accurate.

Wagstaff fails to sustain his claim that the trial judge abused his discretion at the hearing on the motion for new trial in excluding proffered testimony by a psychiatrist that in his opinion Wagstaff was of unsound mind at the time of the offense. Prior to trial Wagstaff had been examined by three psychiatrists, including one of his own selection, and found to be of sound mind. No claim of insanity was raised at trial. Wagstaff's contentions founded on a claimed offer of proof that he was of unsound mind both at the time of trial and at the motion for new trial are without basis in the record of this case.

ARGUMENT

I

Wagstaff is without standing to complain on appeal of the admission of his statement that he was a "three-time loser." In any event, in view of the overwhelming evidence of his guilt, the incident does not require reversal of the judgment of conviction

Wagstaff's first point is that he "suffered prejudicial and reversible error when a policeman testified to an alleged admission of appellant that he was 'a three-time loser'." At the outset we point out that the testimony complained of stemmed solely from defense counsel's cross-examination of Officer Smith. Wagstaff is asking that this Court reverse, not for something said or asked by the trial judge or the government's attorney, but for answers to questions asked on cross-examination by his own counsel. The transcript reveals the following (J. A. 31-32):

Q. You had no further conversation with Wagstaff, other than what you have related, which took place at the car; is that right?

A. Well, I had the conversation of asking him about the gun, about locating the gun.

Q. You asked him?

A. Wagstaff, yes.

Q. About the gun?

A. Yes, sir.

Q. Where was that, in No. 6?

A. Yes, sir.

Q. What did you say?

A. I asked him if he had the gun, or if he would tell us where the gun was, and he stated, "Hell, no. I am not going to tell you. After all, I am a three-time loser."

Q. Now, you are sure, now, of what he said?

A. Well, words to that effect. I mean, the portion of "I am a three-time loser", that was definitely in there. Whether he used the word "Hell" or not, I am not certain.

Q. Well, did he say to you "I know nothing about the gun."?

A. No, sir.

The COURT. What is your answer?

The WITNESS. No, sir.

Q. (By Mr. Ahern.) Well, can you tell us what he said about the gun when you asked him about the gun?

A. He said "You don't expect me to tell you. After all, I am a three-time loser."

Q. That is what he said to you?

A. Yes, sir.

Q. Did you ask him any further questions?

A. No, sir. I did not.

Wagstaff's trial counsel apparently did not think the incident was of any significance for he did not object to the statement, or ask for a mistrial, nor ask that the jury be instructed at the time to disregard it. The matter did not arise again until the trial judge himself pointed to it when he was considering with counsel that special instructions should be given the jury. The record reveals the following:

The COURT. There is one further evidentiary element the Court has given some thought to, and that is the testimony of the officer, who said that the defendant stated that he was a three-time loser.

Mr. SMITHSON. Officer Smith. Your Honor.

The COURT. Officer Smith.

Mr. AHERN. I am worried about that.

The COURT. Which raises the question of criminal record. The matter of criminal record is something in reference to which the generally accepted charge of the court is that if the defendant takes the stand, and so on. The Court will attempt to charge in effect that the guilt or innocence of this defendant must be determined by the evidence in this case, and in this case alone.

Mr. AHERN. Yes, Your Honor.

(Brief discussion off the record.)

Mr. SMITHSON. If the Court recalls, my statement to the witness, when I asked him, "Did you talk to this man?" was whether or not he talked to him about a gun.

The COURT. That is right. It was brought out in cross-examination.

Mr. SMITHSON. That is right. (J. A. 40-41).

Trial counsel indicated that the proposed instruction would be satisfactory and the court charged the jury as follows:

The guilt or innocence of this defendant must be determined by you on the basis of the evidence in this case, and in this case alone. You are further instructed that no inference of guilt arises against the defendant because of his failure to testify as a witness in his own behalf. The law provides that a defendant may if he sees fit not be a witness in his own behalf. You are not permitted to draw any inference from this fact. Obviously, the purpose of the law would not be accomplished if the defendant were permitted not to testify and if you were permitted to draw any inference therefrom. Consequently, the Court points out that no inference of guilt arises against the defendant because of his failure to testify as a witness in his own behalf (J. A. 45-46).

At the conclusion of the charge trial counsel stated specifically that he had no further requests for instructions and when asked if he had "any exceptions to the charge," replied, "None whatever" (J. A. 47).

Even assuming, arguendo, that the admission of the alleged offensive testimony was erroneous, and assuming further that the appellant was prejudiced thereby, yet, in view of the fact that the guilt of the appellant was overwhelmingly established by other evidence of unquestioned competency, it is clear that the substantial rights of the appellant were not disturbed. It follows, therefore, that the admission of such evidence was not so prejudicial as to require the reversal of the judgment of the District Court. *Wheeler v. United States*, 82 U. S. App. D. C. 363, 165 F. 2d 225 (1947) *cert. denied* 333 U. S. 829, 68 Sup. Ct. 448, 92 L. Ed. 1115. *Guy v. United States*, 71 App. D. C. 89, 107 F. 2d 288 (1939) *cert. denied* 308 U. S. 618, 60 Sup. Ct. 296, 84 L. Ed. 516; *Borum v. United States*, 61 App. D. C. 4, 56 F. 2d 301 (1932), *cert. denied sub nom., Logan v. United States*, 285 U. S. 555, 52 Sup. Ct. 459, 76 L. Ed. 944.

Finally, it seems clear that the appellant is without standing to contend that the judgment below should be reversed when it is remembered that "this testimony was elicited by appellant's own counsel on cross-examination. Counsel apparently asked a few too many questions. That is a fault most of us who have tried cases in court have occasionally committed, but for such wounds there is no balm to be applied by a court of appeals." *Felton v. United States*, 83 U. S. App. D. C. 277, 279, 170 F. 2d 153, 155 (1948).

II

Statements made by Osborne in the presence and hearing of Wagstaff after their arrest, and the conduct of Wagstaff when confronted with the accusations contained therein, were properly admitted in evidence. It follows, therefore, that the instruction of the trial court to the jury as to the consideration to be given such evidence was also proper

Police Officer Nash testified that after Osborne and Wagstaff had been apprehended, and during the interrogation of both individuals at the 6th Precinct, Osborne, in the presence and hearing of Wagstaff, stated that he and Wagstaff had committed the robbery for which they had been arrested. Nash further testified that Wagstaff, despite the inculpatory nature of the statements of Osborne, did not deny their truth (Tr.

29-32, 36, 38, 39). The complaining witness testified to the same effect (Tr. 10-12, 16).

It is contended by counsel for the appellant that the trial court erred in admitting the incriminating statements of Osborne, and the conduct of Wagstaff when confronted therewith, in view of the rule of law which provides that one who is under arrest is under no duty to make any statement concerning the crime with which he is charged, even though confronted with statements which link him to that crime. As authority for this proposition the appellant cites *Skiskowski v. United States*,² 81 U. S. App. D. C. 274, 158 F. 2d 177 (1946); *Yep v. United States*, 83 F. 2d 41 (10th Cir. 1936).

While there may appear to be some conflict among the lower Federal Courts as to whether a person under arrest is entitled to remain silent when faced with incriminating statements by those arrested with him, and which link him with the crime for which he has been arrested,³ the courts of this jurisdiction continue to follow the rule of law laid down by the Supreme Court in *Sparf v. United States*, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343 (1895), to the effect that evidence of a defendant's silence when, after arrest, he is confronted with incriminating statements by his co-defendants is admissible against him. *Dickerson v. United States*, 62 App. D. C. 191, 65 F. 2d 824, *cert. denied* 290 U. S. 665, 54 Sup. Ct. 39, 78 L. Ed. 575 (1933); see *Rocchia v. United States*, 78 F. 2d 966 (9th Cir. 1935); *Graham v. United States*, 15 F. 2d 740 (8th Cir. 1926), *cert. denied* 274 U. S. 743, 47 Sup. Ct. 537, 71 L. Ed. 1321. Cf., *Egan v. United States*,

² Appellant's reference to the *Skiskowski* case as support for his contention that the evidence under consideration was erroneously admitted is patently inapposite. While it is true that this Court said, by way of *dictum*, that "where * * * the defendant is under arrest, it is doubtful if 'silent assent' is admissible," the question there under consideration was whether or not evidence of accusatory statements made in the presence of the defendant are admissible when positively refuted by the defendant. Although it was held that such evidence is objectionable, it is significant to note that the Court did not deem its admission of such serious character as to warrant reversal of the judgment of the lower court, particularly in view of the fact that no objection was made to its introduction.

³ Compare, e. g., *Rocchia v. United States*, 78 F. 2d 966 (9th Cir. 1935) with *McCarthy v. United States*, 25 F. 2d 298 (6th Cir. 1928).

137 F. 2d 369 (8th Cir. 1943), *cert. denied* 320 U. S. 788, 64 Sup. Ct. 195, 88 L. Ed. 474.

Moreover, it is the invariable rule in the Federal Courts that the admission in evidence of undenied accusatory statements made by a co-defendant in the defendant's presence following arrest, does not constitute a ground for reversal on appeal in the absence of a timely objection thereto in the trial court. *Price v. United States*, 5 F. 2d 650 (6th Cir. 1925). Cf. *Skiskowski v. United States*, 81 U. S. App. D. C. 274, 279, 158 F. 2d 177, 182 (1946). It is undisputed that no objection was raised in the instant case as to the admissibility of the evidence in question.

The appellant argues that if the undenied accusatory statements were admissible, the trial court committed reversible error by failing to instruct the jury that such statements were not admitted to prove the truth of the facts asserted, but merely to show the conduct of the appellant when confronted therewith.

Although the court did not utilize the precise terms now deemed requisite by the appellant, the substance of the carefully worded instruction was directed exclusively to the inferences that might be legitimately drawn from the conduct of the appellant under the circumstances, and not at all to the evidentiary value of the incriminating statements as such. Examination of the instruction reveals the capriciousness of the appellant's contentions herein:

There has been some testimony in this case of certain statements made by Osborne allegedly in the presence of the defendant, Wagstaff. This testimony is admitted because it is the experience in law that if a statement is made concerning the participation in a crime by another individual, the statement being made in his presence and he fails to deny that statement, *his failure to deny the statement constitutes an admission*. An admission is a concession or acknowledgment by a party of the existence of certain facts. The silence of a party in a particular set of facts and circumstances may constitute an admission by that party. *Evidence of silence*

may be used against the silent party as evidence of an admission, where the silence is improper and unnatural. *For you to consider the silence of this defendant as evidence of an admission*, there are certain conditions which must be met. First, a reply must have been natural and proper, and the party must have had knowledge of the stated facts and an opportunity sufficient to enable him to reply. The statement of the accused person must have been made in the presence of the other party. It must have been made with reference to facts about the other party, the facts relating to the rights of the silent party. It must have been heard and understood by the silent party, who had an opportunity to reply but did not reply. It must have been about facts, the truth of which was known to the questioner, and it must have been made by a person who is entitled to the information sought. [Emphasis supplied.]

Again it is to be noted that defense counsel although given an opportunity to except, expressed his satisfaction with the instructions as given (J. A. 47).

The Government submits that the admission in evidence of the incriminating statements of Osborne to demonstrate the conduct of Wagstaff when confronted therewith, was eminently proper and in accordance with the settled law of this jurisdiction. The trial court's charge in this connection clearly reveals that the jury was appropriately instructed as to the limited purpose for which this evidence was to be considered.

III

The pistol found at the scene of Osborne's arrest was properly admitted in evidence against Wagstaff in view of the strong evidence that Wagstaff had been Osborne's partner in robbing Murray and the man who held the pistol in Murray's face. It was likewise not error for the court to deny Wagstaff's motion for a judgment of acquittal

Here, as in the trial court, Wagstaff objects to the admission in evidence of a pistol, Government Exhibit 1, and also to the trial court's action in permitting the case, as far as it related to Wagstaff's carrying and using a pistol, to go to the jury.

We submit that the trial court's action in both instances was correct.

Trial counsel's objection to admission of the pistol is found at (J. A. 25-26). When the court requested counsel to state his grounds for objection counsel replied as follows:

Mr. SMITHSON (government counsel). I would like to offer in evidence, if Your Honor please, Government Exhibit No. 1, consisting of .45 Colt automatic.

Mr. AHERN. I will object to it, if Your Honor please.

The COURT. State the grounds of your objection.

Mr. AHERN. This is a gun, according to the Corporal, that was in the possession and hands of a co-defendant, and who told the officer that he, the co-defendant, had hid a gun behind some hedge.

Now, up to the present time, I certainly do not feel that there is sufficient evidence to connect this defendant with the co-defendant, or any statement that he made.

My position is, if Your Honor please, that this gun might be permitted to go in evidence by Your Honor at a later time, but certainly not at this particular time.

We contend that the gun was properly admitted at that time, and in any event, as Wagstaff's trial counsel anticipated, certainly would have been admitted later in view of the evidence that was forthcoming. The admission of the pistol in evidence and the submission of the "pistol question" to the jury depended on the evidence produced by the Government.

It was never disputed at trial that Murray had been robbed at gun-point by Osborne and a partner. Osborne had pleaded guilty (J. A. 35). From Osborne's written statement, put in evidence by Wagstaff and not contested by him, it appeared that Osborne's partner, "Joe," had the gun and held it to force Murray to hand over his money; that as Osborne and "Joe" ran from the cab "Joe" handed the gun to Osborne; and that Osborne threw the gun under a hedge just before he was arrested. That written statement by Osborne was in line with the testimony of Murray, and Nash, the officer who recovered the pistol. The issue at trial was whether the "Joe" in Os-

borne's written statement was Joseph Wagstaff, the appellant. At the time the pistol was received in evidence the written statement of Osborne's had already been put in evidence by Wagstaff. Murray had positively identified Wagstaff as one of the men (the other being Osborne) who hailed his cab and as the man who held the gun in his face (J. A. 7, 12). Officer Jackson testified that he had arrested Wagstaff and Osborne in the vicinity of the robbery shortly after it occurred (J. A. 27-29). There had also been Nash's testimony that on the basis of Osborne's information the pistol had been recovered from under a hedge in the vicinity of Osborne's arrest, shortly after Osborne and Wagstaff had broken away from Officer Jackson. Nash also testified without objection that Osborne identified Wagstaff as being the person referred to as "Joe" in the statement (J. A. 25). There was also for the jury's consideration the fact that Wagstaff did not deny Osborne's accusatory statements at the police station that it had been Osborne and Wagstaff who robbed Murray (J. A. 9, 14, R. 61); that Wagstaff held the gun (J. A. 9); and that the pistol put in evidence was the weapon they had used and the one thrown under the hedge by Osborne after Wagstaff had given it to him (J. A. 17).

Consequently, we submit that there was strong evidence that Murray was robbed at gun-point by Wagstaff, and that it was an extremely probable inference that the gun introduced in evidence was the gun held by Wagstaff. Accordingly, the trial judge correctly admitted the gun in evidence and submitted the case to the jury. Wagstaff's claim of error does not survive an examination of the facts.

IV

The trial court's instruction to the jury relative to the accomplice testimony of Osborne was clear, unambiguous and wholly accurate

At the trial in the court below, Osborne was called as a witness for the defense and testified, in substance, that he and another individual, not Wagstaff, however, were in a taxicab on the night and at the approximate time the robbery in question was committed (J. A. 35). On cross-examination, Os-

borne admitted that he was a party to the crime for which he and Wagstaff had been indicted, that, in fact, he had confessed to his participation therein and had pleaded guilty to the charge filed against him.

With respect to the above testimony, the trial judge instructed the jury as follows:

The law recognizes a relationship between individuals who set out to accomplish a common objective, as accomplices. An accomplice is anyone who knowingly and voluntarily cooperates with, aids, assists, advises or encourages another in the commission of a crime. It is a question of fact for you to determine whether the defendants Wagstaff and Osborne are accomplices, you are, of course, entitled to consider the testimony of Osborne as being that of the testimony of an accomplice of this defendant [appellant]. It is the duty of the Court to admit the testimony of an accomplice and that of the jury to consider it. It should, however, be received with caution and scrutinized with care. The degree of credit which should be given such testimony is a matter exclusively within the province of the jury (J. A. 44-45).

The appellant presently contends that the trial court's above instruction is equivocal and misleading in that it fails to state that Osborne, who had admitted his complicity in the crime, was an accomplice as a matter of law, and thus the jury was permitted to consider whether or not Osborne, as well as Wagstaff, was an accomplice.

The argument of appellant is incongruous on its face. In view of the testimony introduced at the trial, there could be no doubt in the minds of the jurors that Osborne was a participant in the robbery. He had so stated in his testimony before the jury (Tr. 100). He had so stated in his confession to the police officers on the night of his arrest, which confession had been read to the jury (Tr. 55). The jury knew that the robbery had been committed jointly by Osborne and another man (R. —). The only question before the jury, insofar as the testimony of Osborne is concerned, was whether or not

Wagstaff was the accomplice of Osborne at the time the robbery had been committed. It was to this question that the accomplice instruction to the jury was, as it should have been, directed. A mere reading of the instruction demonstrates the intelligibility and comprehensiveness with which it was drafted.

Even if it be assumed that there were imperfections of phraseology in the instruction to the jury, and we do not concede that such was the case, it is obvious that the jury could not possibly have been misled or confused as to the trial court's meaning therein. Certainly it may be said that no error affecting the substantial rights of the appellant Wagstaff was committed. Cf. *Wright v. United States*, — U. S. App. D. C. —, 189 F. 2d 699 (1951).

Moreover, it is abundantly clear that defense counsel was well satisfied as to the adequacy of the accomplice instruction of the trial court. At the close of the evidence, and before the final arguments of counsel, the trial judge announced that he would instruct the jury on the accomplice testimony of Osborne, stating that "the Court must charge on receiving the testimony of an accomplice with care." Defense counsel replied that he had "*no objection*" to the usual instruction in this respect (Tr. 112). (Emphasis supplied.) After the closing arguments had been made, the trial judge inquired as to whether any special charges to the jury were requested. Defense counsel signified that he desired some cautionary instruction with respect to the accomplice testimony of Osborne. Thereupon, the trial judge indicated that he would instruct the jury as follows: "Whether the relationship of Wagstaff to Osborne is that of an accomplice, is a question of fact for the jury to determine. If upon the fact of the testimony they conclude that they are accomplices, then they should consider the testimony of Osborne with caution." (Tr. 117). In response to the above statement, defense counsel replied: "*That will be fine, Your Honor.*" (J. A. 40). Finally, after the trial judge had completed his instructions to the jury, defense counsel was asked if he had any exceptions to the charge. Defense counsel replied: "None whatever" (J. A. 47).

We submit that the trial court properly instructed the jury with respect to the accomplice testimony of Osborne, that the

instruction is clear and unambiguous and could not have confused the jury in its consideration of the testimony to which it related.

V

Wagstaff fails to sustain his claim that the trial judge abused his discretion at the hearing on the motion for new trial in excluding proffered testimony by psychiatrist that in his opinion Wagstaff was a unsound mind at the time of the offense. Prior to trial Wagstaff had been examined by three psychiatrists, including one of his own selection, and found to be of sound mind. No claim of insanity was raised at trial. Wagstaff's contentions founded on a claimed offer of proof that he was of unsound mind both at the time of trial and at the motion for new trial are without basis in the record of this case

In the appellee's view Wagstaff's final contention, so far as it relates to an alleged unsoundness of mind at the time of trial and at the motion for new trial, is without any factual basis in the record of this case. The record is clear that at the hearing on the motion for new trial Wagstaff's proffer of psychiatric testimony went only to an alleged insanity at the time of commission of the offense. Accordingly, our brief discusses only what is said to be error in the trial court's refusal to hear *that* evidence.

Since we think they rebut Wagstaff's contention of an abuse by the trial court of its discretion in overruling the offer of psychiatric testimony at the new trial proceeding,⁴ we relate the prior events below touching on the question of Wagstaff's sanity.

In advance of trial Wagstaff's trial counsel moved for a court order for examination of Wagstaff "by two competent psychiatrists on the Gallinger Hospital staff" (R. —). On Wagstaff's motion the trial court directed Dr. Joseph L. Gilbert and Dr. Amino Perretti to make a personal examination of Wagstaff and to file a written report with the court. Dr.

⁴ *Thompson v. United States*, 188 F. 2d 652, 88 U. S. App. D. C. 235: "The trial court has a broad discretion as to whether a new trial should be granted because of newly discovered evidence, and its action will not be disturbed on appeal unless an abuse of that discretion appears."

Gilbert examined Wagstaff on October 20, October 27, November 10, and November 24. Dr. Perretti examined Wagstaff on October 27, November 18, and November 26, 1951. Each of the doctors filed a report setting forth his conclusion that Wagstaff was of sound mind. Thereafter the court ordered that a doctor of Wagstaff's own choosing examine him. Dr. Kline conducted that examination and found Wagstaff to be of sound mind (J. A. 38-39). In view of those events no claim was made at trial that Wagstaff had been of unsound mind at the time of the offense. Even when the motion for new trial was filed there was no hint that Wagstaff would seek to inject the sanity issue into the case. However, after conviction when the motion for new trial came on for hearing, Wagstaff's present counsel stated that he wanted to offer the opinion of a psychiatrist that at the time of the offense Wagstaff had been of unsound mind. The court, undoubtedly recalling the earlier inquiry to trial counsel,⁵ ruled that that was a matter which should have been pleaded at trial. Wagstaff's present counsel agreed, stating only that the court had a "right" to hear it then. Because Wagstaff's claim is that the court's ruling therein was reversible error, we set forth the short record excerpt of the new trial proceeding in its entirety:

⁵ On the day before the case went to the jury the trial judge called counsel to the bench and the following occurred (J. A. 38-39):

"The COURT. I notice an order, Mr. Ahern, dated December 5th, that calls for an examination of this defendant by a doctor. Was that action taken? Was he examined?

"Mr. AHERN. No, he wasn't examined by that doctor, Your Honor. He was examined by Doctors——

"Mr. SMITHSON. Gilbert and Peretti.

"Mr. AHERN. Peretti and Gilbert, and they found him of sound mind.

"The COURT. I found those examinations in the file.

"Mr. AHERN. But there was another doctor. He had Dr. Kline.

"The COURT. This was an examination apparently at the defendant's request, by a doctor of the defendant's selection. That examination was made?

"Mr. AHERN. Dr. Kline made it, and he found him of (psychotic) personality——

"The COURT. But of sound mind?

"Mr. AHERN. Of sound mind.

"The COURT. Very well. I just wanted to be sure the order had been complied with. That is all. Very well, we will adjourn."

Mr. LAUGHLIN. Now, Your Honor, if we may vary the proceeding here somewhat, to save the time of a physician, may I now, or, if you are going to take a short recess, after that, put a doctor on the stand for another point in this case that we want to preserve?

The COURT. What is the nature of the testimony?

Mr. LAUGHLIN. Psychiatric testimony.

The COURT. The Court will not take psychiatric testimony at this stage of this case. Was there any motion for psychiatric examination? What is your point?

Mr. LAUGHLIN. Well, we want to show, Your Honor, that *at the time this offense was committed*, this man was of unsound mind, and that, therefore, he could not distinguish between right and wrong.

The COURT. That is a defense that should have been plead at the trial of the case, Mr. Laughlin.

Mr. LAUGHLIN. I agree with Your Honor. There isn't any question about that. But if it wasn't, I think Your Honor has the right now to hear that and to determine after hearing it whether it is the type of testimony that could possibly have had an effect on the jury. I agree with you that it should have been done at the trial, but it wasn't. Now we are prepared to offer it.

The COURT. In order to preserve your status on the record, the Court will decline to hear testimony of this kind, on the grounds that if it is a matter of defense, it should have been pleaded at the trial of the case.

Mr. LAUGHLIN. Do you suppose we could do this, Your Honor, so the record will be fully preserved? May the record show that Doctor Michael Miller, a physician, also a psychiatrist, is personally present? I received word that he is outside. Had he been permitted to testify, he would testify he examined the defendant on at least two occasions——

The COURT. When?

Mr. LAUGHLIN. Yesterday, and the day before; that he reviewed his whole background, and it was his testimony that he suffered from a mental disturbance,——

The COURT. It would be his testimony.

Mr. LAUGHLIN. It would be his testimony—to such an extent that *at the time of the commission of this offense* in September, 1951, he was not able to distinguish right from wrong, and, therefore, was of unsound mind at that particular time. [Emphasis added.]

Accordingly, we submit (a) that the record discloses only an offer to present opinion testimony to the effect that Wagstaff was of unsound mind at the *time of the offense*, and (b) that it was not an abuse of discretion to reject that belated offer made in support of a defense theory which had been weighed and rejected by prior counsel.

CONCLUSION

Wherefore, we submit that the judgment of the District Court should be affirmed.

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United States Attorney.

JOSEPH M. HOWARD,
FREDERICK G. SMITHSON,
WILLIAM E. KIRK, Jr.,
WILLIAM J. PECK,
Assistant United States Attorneys.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 11,366

JOSEPH A. WAGSTAFF, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

PETITION FOR REHEARING EN BANC

and

**MEMORANDUM IN SUPPORT OF PETITION FOR
REHEARING EN BANC**

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED AUG 6 1952

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IN THE
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PETITION FOR REHEARING EN BANC

Now comes the appellant and moves the Court for an order allowing rehearing in the above entitled cause and further requests that he be allowed the privilege of oral argument before the full bench.

Appellant says there are serious and substantial questions of law involved in his appeal, and the opinion of this Court as it presently stands penalizes appellant for the omissions of his trial counsel.

One of the principle questions involved in this appeal is that the Government, by subterfuge, introduced the criminal record of appellant. Appellant was charged with robbery and had a prior criminal record such that he did not choose to take the witness stand. A police officer, when interrogated by appellant's counsel as to what the officer stated, did not respond to the question but stated that appellant shouted he was "a three-time loser". Although

no objection was made and although appellant's counsel did not move for a mistrial, appellant set forth the cases in his brief stressing the fact that in the interest of justice this Court should reverse.

Another substantial question involved in this appeal is the erroneous charge of the trial judge on the question of admissions by silence. In the instant case appellant, while under arrest, refused to comment when certain statements were made in his presence. The trial judge exhaustively charged the jury on the principle of admissions by silence, and appellant contended to this Court again, although no objection was made in the trial court, that the court violated the rule laid down by this Court in the case of *Skiskowski v. U. S.*, 81 App. D. C. 274.

Appellant now urges in this petition for rehearing a substantial question which he refrained from urging in his original brief. Appellant now contends that he did not have effective assistance of counsel. If the opinion of this Court stands, appellant is therefore penalized for the omissions of his trial counsel in failing to make objections during the course of the trial. In view of the fact the punishment is so severe, we will now urge in our petition for rehearing that appellant was denied effective assistance of counsel within the meaning of *Powell v. Alabama*, 287 U. S. 48, and the cases cited therein.

JAMES J. LAUGHLIN,
ALBERT J. AHERN, JR.,
National Press Building,
Washington 4, D. C.
Counsel for Appellant.

I certify that I have this day mailed copy of this petition to Joseph M. Howard, Esq., Asst. United States Attorney, Court House, Washington, D. C.

JAMES J. LAUGHLIN.

This the 24th day of July, 1952.

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 11,366.

JOSEPH A. WAGSTAFF, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

**MEMORANDUM IN SUPPORT OF PETITION FOR
REHEARING EN BANC**

In the instant case it was apparent to the police and the prosecuting attorney that appellant could not take the witness stand. This was evident because of his prior criminal record. Police officer Smith, when testifying for the Government, was asked the following question by appellant's counsel:

"Q. What did you say?

A. I asked him if he had a gun, or if he would tell us where the gun was, and he stated, 'Hell, no. I am not going to tell you. After all, I am a three time loser'."

Appellant calls the Court's attention to the cases set forth on pages 9, 10 and 11 of appellant's brief, all of which stand for the principle that when evidence of other

crimes is introduced, the error is reversible. We wish to call the Court's attention to the fact that the reply of Officer Smith was not responsive to the question. He was asked specifically what he (Officer Smith) stated, and in reply he interjected the prejudicial statement which appellant was alleged to have made. Of course appellant was in no position to take the witness stand to deny the statement made by Officer Smith. If the opinion stands, appellant will have to suffer for the omission of his trial counsel in failing to move for a mistrial and failing to object to the question, and his failure to request the trial judge to instruct the jury to disregard the response of Officer Smith. Since the punishment is 7 to 21 years, we feel this Court should not invoke Rule 30, Federal Rules of Criminal Procedure, but should look to substance rather than to form. Appellant calls this Court's attention to the fact that in *Ewing v. U. S.*, 77 App. D. C. 14, this Court exhaustively discussed the question raised in appellant's brief as to the cross-examination of the Government witness, Miss Chamberlain, and the rebuttal of her testimony by the complaining witness' mother. It is to be noted that no objection was raised to this question in the trial court, and the first time it was raised was on the motion for new trial, as was done in this case. Also, as in this case, present counsel did not represent the accused in the trial court. Although no objection was made, Judge Rutledge, in a well considered opinion, did not invoke Rule 30, and as a result the point raised received full consideration by this Court.

In *Tatum v. U. S.*, 88 App. D. C. 386, this Court said:

"Ordinarily, failure of counsel to record his objections to the charge would constitute a waiver of the points not raised. It has always been the custom of this Court, however, 'in cases of serious criminal offenses, to check carefully the record for error prejudicial to the defendant which he did not urge'. This accords with Rule 52(b) of the Federal Rules of Criminal Procedure, which provides that 'plain errors or defects affecting substantial rights may be noticed al-

though they are not brought to the attention of the court'."

Therefore we urge this Court to consider the substantial question involved, even though no objection was made in the trial court. The sentence is unusually severe, and under the present practice of the Parole Board, appellant would not be considered for parole. Therefore it would mean that he would have to serve the maximum term, with only deduction for good conduct, if earned.

The trial court committed reversible error in instructing the jury on the question of admissions by silence. Appellant calls this Court's attention to pages 14, 15 and 16 of his brief, in which appellant urges that the trial court committed error in charging the jury that the silence of appellant while under arrest constituted an admission. We urge this Court that it violates the rule announced by this Court in *Skiskowski v. U. S.*, 81 App. D. C. 274. Objection was raised at the time of trial to the statements which Osborne made in the presence of appellant. Appellant's counsel, however, did not object to the instructions of the trial judge on the question of admissions by silence. We urge this Court, as stated in the previous point, to consider this error as prejudicial within the meaning of Rule 52(b). We feel that this error is prejudicial and that it entitles appellant to a new trial.

Counsel for appellant did not raise the point of incompetency in the brief filed in this Court. This is always a matter raised with some hesitation. We realize that in the trial, particularly in the trial of a criminal case, decisions must be made on the spur of the moment, and great leeway must be allowed for matters of judgment and strategy. However in the instant case we can see no excuse for failure to protect the constitutional rights of the appellant. It is plain from a reading of the opinion of this Court that no consideration was given to the many points advanced due to the fact that no objection was made in the court below.

It is a strange system of laws for the courts to permit one of its members to practice law and represent accused persons in courts of law, and then to offer no protection to the accused when counsel is negligent and derelict in his duty.

In the case of *State v. Jones*, 12 Mo. App. 93, the court, after stating that as a general rule a new trial would not be allowed for ignorance or negligence of an attorney, continued:

"But must there be absolutely no limit to the operation of this rule; even where a human life is at stake." See *Powell v. Alabama*, 287 U. S. 45. *People v. Schulman*, 299 Ill. 125, 132 N. E. 530, 24 A. L. R. 1022. *Sanchez v. State*, 199 Ind. 235; 157 N. E. 1. *Cornwell v. State*, 106 Ohio St. 626; 140 N. E. 363.

In the case of *State v. Lewis*, 9 Mo. App. 321, we find this:

"Where a human life is at stake every instinct of humanity, every sentiment of justice demands that the particular facts of the case be more narrowly looked into so that mere weakness, ignorance or helplessness may not be visited with the inflictions designed by a general rule to punish negligence, trifling or scheming for a delay of justice. Men must not be murdered by technicalities."

This Court has stated in *Kinard v. U. S.*, 68 App. D. C. 254:

"It is the imperative duty of the Court to see that a defendant has a fair trial no matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense." See also *Patton v. U. S.*, 42 App. D. C. 239. *Meadows v. U. S.*, 65 App. D. C. 275.

We must not overlook the words of the New York Supreme Court in *Sharp v. Mayor*, 31 Barb. 578 (N. Y.):

"Courts of law are not to be used in effecting through the forms of law, the ruin of the party who has employed negligent or unworthy attorney."

Then the court said further:

"If such considerations can prevail where only money or property is concerned how much weightier should they be in every rightly constituted mind when a human life is in the balance."

We find in the same case this language:

"The wisdom and humanity of the present age demand that the maxim 'every man is presumed to know the law' shall be reversed both in theory and practice when applied to legal methods of conducting a defense against a felony."

The case of *State v. Gleeman, et al.*, 170 Minn. 197; 212 N. W. 203, 207, we find this:

"We are not disposed to deny that the conduct of one's own counsel may be so fraudulent or treacherous that a new trial should be granted because of it. A defendant is entitled to a fair trial. When his counsel has been so incompetent or ignorant as to prevent his getting it, though without fraud or treachery, a new trial may be had in an exceptional case."

We should never forget the following words from *People v. Mangenaro*, 218 N. Y. 9:

"The safety and security of every citizen requires that if one accused cannot be fairly and lawfully convicted he should not be convicted at all."

In *Kidwell v. U. S.*, 38 App. D. C. 366, we find:

"In a felony of this enormity, where a conviction will be sustained upon the unassailed testimony of a single witness * * * and where the difficulty of making a defense is unusually great, it is the duty of the court to carefully safeguard the defendant at every stage of the proceedings and secure to him a trial legal in all respects."

In conclusion we call attention again to the remarks of Judge Miller in the case of *Kinard v. U. S.*, *supra*, when he said: (quoting from *Clyatt v. U. S.*, 107 U. S. 207; 49 L. Ed. 726)

“Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained.”

As already stated, the police officer well knew that the defendant (appellant herein) would not take the witness stand. Therefore when the officer, with full knowledge that he would not be contradicted, made the statement that the defendant uttered the words “I am a three-time loser”, appellant’s rights to a fair trial were lost. This was the type of prejudice that could not under any theory be irradiated from the minds of the jury. It has been well stated in the words of Justice Pecora, in the unreported case of *People v. Hines* in New York (1938):

“One drop of poison taken into the human system might kill the individual”.

And also these words:

“One little germ finding its way into the blood stream might cause the collapse of the person.”

JAMES J. LAUGHLIN,
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National Press Building,
Washington 4, D. C.
Counsel for Appellant.

I certify that I have this day mailed copy of this memorandum in support of petition for rehearing to Joseph M. Howard, Esq., Asst. United States Attorney, Court House, Washington, D. C.

JAMES J. LAUGHLIN.

This the 24th day of July, 1952.

**I certify that this petition is filed in good faith,
and not for the purpose of delay.**

James J. Laughlin

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